No. 2958

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, et al,
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee.

IN EQUITY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

APPELLANTS POINTS AND AUTHORITIES

(To be accompanied by APPELLANTS BRIEF UPON THE FACTS)

JOSEPH H. CALL,
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Solicitors for Appellants.

GEO. RICE & SONS, PRINTERS, LOS ANGELES

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AUTHORITIES CITED

ASSIGNMENT OF ERRORS.

—I—

That said United States District Court for the Southern District of California, Northern Division, erred in adjudging and determining that the United States did not prior to issuing patent for said lands on December twelve, 1904, investigate and ascertain the true character of said lands as to their being mineral or non-mineral.

—II—

That said court erred in adjudging and determining that the United States did not on and prior to date of said patent have and possess equal knowledge with the Southern Pacific Railroad Company, and other defendants herein, and of the public generally, as to the true character of said lands, as to their being mineral or non-mineral.

—III—

That said court erred in adjudging and determining that the Southern Pacific Railroad Company, defendant herein, or any other person, knew at or prior to the date of issuance of patent to said lands that said lands, or any of them, contained valuable mineral deposits or were known to be mineral lands.

—IV—

That said court erred in adjudging and determining that the Southern Pacific Railroad Company, defendant herein, or any one acting by its authority,

falsely or fraudulently represented to the United States prior to issuance of said patent that said lands were not known to contain valuable mineral deposits, and that they were not known mineral lands.

—V—

That said court erred in adjudging and determining that the United States in the issuance of said patent relied upon, or had any right to rely upon, any statement, affidavit or representation of said Southern Pacific Railroad Company, or of its officers or agents, or that the United States was induced by any statement, or representation made by said company, or of its officers or agents, to issue said patent to said lands, or any of said lands.

—VI—

That said court erred in adjudging and determining that it can be ascertained and determined from geological conditions and examinations upon the surface of the ground that any tract of land contains valuable deposits of asphaltum or mineral oil.

—VII—

That said court erred in adjudging and determining that it can be established and proven from geological conditions and superficial examinations without drilling wells, that such land contains asphaltum or petroleum in quantities sufficient to make said land valuable for those deposits, or of such quality as to make such land valuable for such deposits, or

that such deposits can be found at a depth such as to make said land valuable for such deposits.

—VIII—

That said court erred in adjudging and determining that any statement, affidavit or representation made by said Southern Pacific Railroad Company, or by any one acting on its behalf, at or prior to the issuance of said patent, as to the mineral or non-mineral character of said lands, or any of them, was false or untrue.

—IX—

That said court erred in adjudging and determining that the Southern Pacific Railroad Company, or any person acting by its authority, at or prior to the date of said patent, made any statement or representation of fact to the plaintiff, as to the non-mineral character of said lands, or any of them, or did otherwise than express opinions as to the character of said lands, made in good faith and based upon a superficial examination of said lands without borings, excavation or examinations under ground.

—X—

That said court erred in adjudging and determining that said patent to said lands, dated December twelve, 1904, was not a regular and valid determination by the United States, that said lands were subject to be selected as indemnity by the Southern Pacific Railroad Company under its grant of July twenty-seventh, 1866, and that said lands were not,

by said patent, determined to be non-mineral lands, and of the character of lands that said Company was entitled to select as indemnity.

—XI—

That said court erred in adjudging and determining that the patent of the United States to said lands, or any of them, be cancelled, annulled or vacated.

WHEREFORE, said appellants jointly and severally pray that said decree may be reversed, and that said District Court be ordered to reverse said decree and dismiss the bill of complaint herein.

STATEMENT OF THE CASE.

This is an appeal by the Southern Pacific Company, Southern Pacific Railroad Company and the other defendants, from a final decree entered August 9, 1915, by the United States District Court, Southern District of California, Northern Division, cancelling and annulling a patent issued by the United States on December 12, 1904, to the Southern Pacific Railroad Company for 6109.17 acres of land in *township* 30 *south, range* 23 *east,* M. D. M., California, as lands enuring to said railroad as indemnity under the Act of Congress of July 27, 1866, and joint resolution of Congress of June 28, 1870.

The bill alleges in substance, that the defendant railroad company selected said land as non-mineral land and fraudulently concealed, from the Govern-

ment, the mineral character of said land and fraudulently represented to the Government, in its application to select and in a non-mineral affidavit accompanying it, that said lands were not mineral lands and were of the character contemplated by the said grant, that in fact said lands contained rich and valuable deposits of mineral, all of which facts were then known to said railroad company, that said statements were made for the purpose of deceiving the Government and inducing the issuance of a patent for said lands, that the Government believed said statements and acted upon them and was induced, thereby, to issue the patent in question, that the Government was induced, thereby, to omit to make any examination, investigation or inquiry as to the true facts and as to the mineral or non-mineral character of said lands. (R. 1)

The answer of the Southern Pacific Railroad Company and of the other defendants puts in issue all material allegations of the bill. The answers admit and allege: that these lands were duly and legally selected by the railroad company and were regularly and legally patented to the railroad on December 12, 1904. (R. 23, 42)

The record shows that the so-called non-mineral affidavit made on behalf of the railroad was based solely upon *information and belief* and was based upon the usual surface examination of the land without any oil wells, test holes or excavations having been made in the land, prior to this patent, either by

the Government, the railroad, or by any other person, and was merely an opinion. The undisputed testimony, in the case, shows that no oil well had ever been drilled upon any of the lands in suit, either prior to the patent or subsequent to its issuance.

It is not pretended that the railroad company or any of the defendants ever made any surreptitious or clandestine or other examination, or exploration of any of the lands in suit, by drilling wells or excavations, nor had any means for forming an opinion and belief, as to the character of the lands, that was not open to the Government as well as to the public.

In attempting to annul the Government patent to this land, on the evidence adduced, counsel for the United States demands a new and different interpretation of the laws from that which has prevailed for the past half century. From the undisputed evidence it appears that the Government does not predicate this case upon the ground that any valuable deposit of oil was *actually known* to be present in these lands, or any of them, at the time patent was issued, nor upon the ground that it was known that oil could be obtained at a depth, which in 1904, date of patent, with the then means of transportation and then values would have rendered the deposit *valuable* or *profitable* to *work,* nor upon the ground that a sufficient *quantity* of oil was known to exist in that land to make the working profitable, and to justify large expenditures in sinking wells. Instead of proving *then knowledge* of *valuable minerals,* there is an at-

tempt to substitute theories, opinion, surmises, suspicions, conjectures and speculations.

If a Government patent can be vacated upon such a showing, the United States Government has never issued a patent to any tract of land as non-mineral which cannot be annulled upon like character and sufficiency of evidence as that adduced in the present case.

Every tract patented by the United States, from the Atlantic to the Pacific, and from Canada to Mexico, has contained nothing but minerals. The earth is mineral; clay is mineral; sand is mineral and rock is mineral, and there probably is not a tract in that entire area in which valuable minerals may not, at some future time, be developed and exploited and made profitable with the future advancement of science, cheapened facilities of transportation and new demands of commerce. The court knows judicially that the coal and oil fields of Indiana, Illinois, Iowa, Missouri and Oklahoma were largely patented under the settlement laws and as non-mineral.

Doubtless so-called "geological experts" could be produced today who could testify that by a metaphysical operation they could transport themselves back to the time when patent was issued for any of those lands, and that they could have found geological indications of the existence of oil or other minerals, which might, at some future time, be profitably extracted.

The lands in suit are situated about six miles east

of McKittrick and McKittrick oil fields, and about ten miles northwest of Buena Vista Lake, and about fifteen miles north of the Sunset oil fields, and are in what is now known as Elk Hills. (See map plaintiff's Exhibit "O" herein accompanying "Appellant's Brief on Facts.)

Witnesses called by the Government had located or joined in the location of many miles square of land in and around the Elk Hills country, prior to 1904, without having made mineral discovery. One located in ten sections, covering 6,000 acres, and another located in seven sections or about 4,500 acres, and another joined in locating eight or ten sections, and another 24,000 acres, another 200 quarter sections, covering 32,000 acres, and another said 60 square miles were located. All these "locations" were abandoned prior to patent to the railroad.

These so-called "locators", called by the Government in this case to impeach its land patent, belong to that class of men who pretend to locate great areas for oil, covering hundreds of square miles of what they call "speculative territory", without any actual discovery of oil, hoping that someone would be found to put down an oil well and actually discover oil somewhere in paying quantities.

Much of the Government's testimony, introduced into the record (notwithstanding objections by the defendants) relates to explorations, development and drilling of oil wells, *since* the date of this patent in 1904, *on other lands*, some near to and some remotely

situated from the lands in suit, and much more to surmises, opinions and prognostications of geologists.

Of the 6109 acres of land involved in this suit, counsel for the Government has persisted in treating all of the Government subdivisions *as in bulk,* as if these numerous sections of land covering most of a township, were a single tract. There are, in fact, more than 130 Government subdivisions of 40 acres each, embraced in this suit. The prayer of the bill of complaint here is to vacate the patent *to such tracts of land as are found, by the court, to be mineral,* but the bill does not seek to and could not properly seek to annul patents to lands, which are and were non-mineral.

But the Government has not proven that any one of these 40 acre tracts was known to contain valuable mineral deposits in 1904 or since.

The Southern Pacific Railroad Company, in accordance with the regulations of the Interior Department, selected these lands as indemnity and filed with its selection list an affidavit upon *information and belief,* stating in substance that the several tracts of land were not "mineral lands". The Government made a final and physical examination of the land by its own agent, and then required the railroad company to publish its application for eight weeks in a daily paper inviting protests and then, upon a mass of evidence determined that the lands were non-mineral, and issued the patent.

Prior to the issuance of this patent in 1904, the Interior Department of the United States, from time to time, caused these lands in this district to be examined to determine and to ascertain their mineral or non-mineral character, and during that period there were numerous reports made to the Government and filed in the Interior Department, showing the extent of mineral discoveries in this vicinity and as to these lands, the last report having been made in the year 1904, just prior to the patent, that report showing that the lands, selected, were not known to contain any valuable mineral deposits.

On none of these lands has an oil well ever been drilled, or exploration made either before they were patented or since.

Of the 125 witnesses examined in this case, not one of them claims or pretends that he discovered or knew of an oil well or an oil seepage on any of these lands, either before or since they were patented, except one witness, J. A. Kaerth, testifying in an uncertain way from recollections of 11 years before when he saw the land, stated that he found what appeared to be an oil sand or deposit of asphalt on one or two tracts in suit. When this statement was made on the witness stand, defendants' counsel requested Kaerth to go to the land with a representative of defendants' and point out the place or places where he claimed to have seen these indications and this the witness agreed to do. The witness then departed from the place where the testimony was being taken

without carrying out his promise, and counsel for the Government stated in effect, that if defendants' counsel wanted this witness that his attendance should be compelled by subpoena. The testimony and statements of counsel regarding this are abstracted herein *post*.

It is a fair presumption from these acts of witness Kaerth practically admitted by Government counsel, that the witness never discovered any oil sand or asphalt as claimed, and therefore could not point out where he found them. Kaerth's flight from the trial shows that no such oil sand existed.

Two other witnesses found what they claimed to be some dry asphaltum or oil sand in or near some of these tracts, but their testimony as to location was vague. (See post.)

Prior to 1905 the nearest oil well to lands in suit (in Tp. 30, R. 23) was in sec. 29, Tp. 30 R 22, which is 4 miles west of them. (R. 1720).

The first actual drilling in the Elk Hills in Township 30-23 commenced in 1909. (R. 1974, 1975).

The testimony shows, that even if oil had been found on these lands in 1904 when they were patented, that the price of oil then being only 15c to 20c a barrel (R. 334) was so low that the oil could not have been extracted and marketed at any profit. There was no valuable deposit of mineral in the lands at that time even if they had contained oil. The oil had no marketable value in that location.

Seven years after these lands were patented a num-

ber of deep wells, costing approximately two million dollars, were drilled on even sections in this congressional township (30 S., 23 E) or in other townships near to the lands in suit, but all of these wells proved to be non-productive or non-paying wells, excepting one or two not in the lands in suit, and which by reason of their great depth and cost and small production have been declared, by the most intelligent witnesses, to be non-paying wells. Eight of these wells had the following depths in feet, respectively: 4850, 4030, 4000, 3500, 2500, 2400, 1900 and 1700. There were no oil rigs in the Elk Hills until 1910 (R. 2121).

It is testified and admitted by practical oil drillers and operators examined in this case, who testified upon the subject, that it cannot be determined from a superficial examination of a given tract of land where no oil wells have been drilled and no excavations made, that the land contains commercially valuable deposits of oil, and this is also established by the Government maps and scientific publications hereinafter discussed.

POINTS OF FACT WITH ABSTRACT OF TESTIMONY.

(1) TESTIMONY ON BOTH SIDES SHOWS THAT NO OIL WELL HAS BEEN DRILLED AND NO DEVELOPMENT MADE ON ANY OF THE LANDS IN SUIT, THAT NO OIL HAS BEEN DISCOVERED ON THEM, THAT PRIOR TO PATENT IN 1904 NO OIL WELL WAS DRILLED AND NO OIL FOUND NEARER THAN

FOUR MILES FROM NEAREST OF LANDS IN SUIT, AND THAT PRESENCE OF VALUABLE OIL DEPOSITS CANNOT BE KNOWN WITHOUT DRILLING.

The following Abstract of Testimony, upon both sides, shows that no discovery of oil was ever made upon any of the lands in suit, either by so-called oil locators, or by any other person, that no oil well has ever been drilled upon any of said lands, either before or since they were patented, and no oil discovered on them, and that no geologist or oil expert can determine whether or not a given tract of land contains oil in paying quantities where the land has not been developed and where oil wells have not been drilled. That in 1904 the nearest oil well was more than 4 miles distant from them.

Government witness, F. OSKAR MARTIN, much relied upon in this case, mineral inspector connected with the General Land Office, educated in Harvard, in Saxony, in George Washington University and other places, prepared and produced in the form of a map the most important item of evidence in this case, plaintiff's Exhibit "O" above mentioned.

This map and Martin's testimony shows the extent of the oil field or land declared to be oil land by the Government geologists around the Elk Hills. It shows the location of wells and dry holes in part of McKittrick and in the Elk Hills. It shows that ninety per cent of land prognosticated to be oil land

by the Government, has been proven to be barren territory. It shows in connection with the testimony, that no well nearer than 4 miles of any of the lands in this suit was sunk until 1910. It shows that there never was an oil well on any of the lands in suit. It shows that no oil spring or oil seepage was ever found on any of the lands in suit. This map is marked plaintiff's Exhibit "O", and that part of the region around Elk Hills on a reduced scale has been reprinted and is now produced in connection with Appellant's Brief on Facts.

Martin testified in part as follows:

"I am acquainted with lands involved in this suit and have made several examinations of what is termed the Elk Hills from December 1910 until February 1912." (R. 610)

"The full red circles on the map denote wells in which discovery of oil has been made. The open red circles denote incomplete wells. * * * The red hatched lines are lands involved in this suit. The red blotches mark oil or gas seepages." (R. 611)

"The map has been thoroughly checked by me in the field and I am familiar with the conditions. This map represents the condition in the field as it existed in January and February 1912. It has been checked from the field work and is correct." (R. 612)

"I do not know to my personal knowledge

that there had been any discovery of oil by drilling in the Elk Hills before my first examination (1910)" (R. 612, 613)

"The only two wells that I know of in the Elk Hills that have produced oil are the wells on 26-30-23 and 30-30-24. I do not know how much oil the well on 26-30-23 has produced. It has produced some oil. The well on 26 did not contribute very largely to my knowledge of the condition, not any more than the other wells, but as much as the well on section 30. I know from hearsay that those wells were not in existence in 1903 and 1904. I have seen the logs of those wells." (R. 618, 619)

"I would not say that the discovery of oil is in the nature of a gamble. I would call it a speculation more than a gamble. A man that speculates most usually has some reason for speculating, while gambling is just taking a chance whether the man knows anything about it or not." (R. 620)

"No one told me to place myself exactly in the position of a man in 1904 when I examined the Elk Hills, and it did not occur to me to do that. * * * I was ready to consider any evidence that bore upon the character of the Elk Hills and considered anything I observed or anything I heard and thought reliable, and the conclusion I reached at that time was based upon knowledge obtained in 1910.

"Prior to going into the Elk Hills, I believe I had read Bulletin 406 by Ralph Arnold and Harry Johnson. (Government Bulletin)." (R. 621)

Martin further testified that the well called the Honolulu in the Buena Vista Hills lying five or six miles south of the Elk Hills, was sunk in 1909 or 1910. He said:

"I think the Honolulu well reached oil sand in the latter part of 1909." (R. 646)

This Honolulu well of 1909 or 1910 strongly influenced Martin in his opinion that the Elk Hills was known oil territory in 1904? (R. 646, 647)

Martin further testified:

"On Exhibit 'O' I indicated in solid red circles the land on which oil discoveries had been made. There was only one in Township 30-23. That was in Section 26. * * * the drilling had been started prior to the time I had been in the Elk Hills, prior to December 1910. I have been told that it was not started until after January 1905, and have no reason to doubt that." (R. 679)

"Exhibit 'O' does not show any other wells in the Elk Hills where oil had been discovered. * * *

"The other circles on Exhibit 'O' which are not solid red, are wells which have not, so far, produced any oil. In Section 20, 30-23, there are three wells which have not produced oil. They

are commonly termed the wells of the Scottish Oil Company." (R. 679)

"The well on Section 30 in the same township is termed the Redlands well. I am informed that they quit drilling at twelve or nineteen hundred feet. They did not find any oil." (R. 679, 680)

"The three wells indicated in Section 32, 30-23 as dry wells, are known as the 'Midway Pacific.' * * * They did not find oil as far as I know. * * *

"The well indicated on Section 28 in the same township is * * * seventeen or eighteen hundred feet. The log on that well does not show oil. * * *

"On Section 34 in the same township four dry holes are represented on Exhibit 'O'. * * *

"In Section 22 of the same township, four dry holes are noted on Exhibit 'O'. (R. 680, 681) * * *

"In Section 26 in the same township, three dry holes and one oil well are indicated on Exhibit 'O'. * * * I think that none of them is over 2,000 feet deep. * * *

"On Section 24 of the same township four dry wells are represented on Exhibit 'O'. * * * I have been informed that one of them is in the vicinity of thirty-five hundred feet deep." * * *

"In Section 30, 30-24, three dry wells are represented." (R. 681, 682)

"I have been informed that one well in Sec-

tion 28, 31-24, is four thousand feet. No oil was found that I heard of. * * * I do not think they are commercially valuable for fuller's earth. * * * A great deal of what is called fuller's-earth in the Elk Hills is clay. I do not think that the gypsum deposits in the Elk Hills are commercially valuable." (R. 682, 683) * * *

"The Associated Oil Company has been more active in its operations in the Elk Hills than any other company there, and has revealed the only oil that has been found in those hills, so far as I know. I have not discovered any indications of a desire on the part of that company to bury up or conceal the oil there. They furnished me information and logs." (R. 684, 685)

The Government has carried into the record in the volume of documents not printed, pages 600 to 786, an abstract of location notices in the Elk Hills region condensed at printed Record, 1652-1696. These were locations made prior to the patent in this case, by S. G. Drouillard, H. A. Blodgett, M. S. Wagy, J. I. Wagy, W. E. Youle and others. These were locations and relocations usually by the same locators over the Elk Hills country, but none of these locations were based upon an actual discovery of mineral upon the lands in suit or any of them, and they were therefore void under the Act of Congress.

No wells were drilled by any of these locators and all of the locations were abandoned.

Government witnesses, locators and oil men testified regarding these locations in part as follows:

Government witness, H. A. BLODGETT, oil driller and locator, testified:

"Associated with me in these locations were J. I. Wagy, Mr. Lamont, Mr. Jewett, Mr. Farnum, Mr. Packard. I think Mr. Youle's name was on some of these locations. I think the first of these locations were made on December 31, 1899. The locations covered a big stretch of country from the Elk Hills to the Buena Vista Hills. We kept up those locations for about six years. We spent a good deal of money on these locations." (R. 367) * * *

"Q. Did you ever make any discovery on any of your claims?"

"A. Nothing more than was developed by prospecting, that is digging or excavating for roads and digging holes that would be developed for the matter of minerals like gypsum."

"Q. Did you ever make any discovery of mineral in place anywhere on your locations, to your knowledge?"

"A. Well, not to my personal knowledge, because I didn't visit the hills at that time."

"Q. You were quite generally interested in the oil business at that time, were you not?"

"A. I was." (R. 371) * * *

"Q. Now, referring to those claims you were

interested in over in the Elk Hills, did you do your assessment work?"

"A. Not on all the claims. We did some considerable assessment work."

"Q. And you relocated, didn't you?"

"A. We did."

"Q. Several times?"

"A. Yes sir." (R. 387) * * *

"Q. And at the time when you relocated, in each instance, you had as yet made no discovery of oil?"

"A. No."

"Q. And never did make one?"

"A. No."

"Q. And at the time when you first located, and on those subsequent times, you didn't know that there was any oil there, did you?"

"A. No."

"Q. And never did know?"

"A. No." (R. 388) * * *

"Q. Then the reasons you have given are the sole reasons for not developing that property in the Elk Hills?"

"A. I consider those were reasons enough—that the oil had no value."

"Q. Did you have any oil there?"

"A. In the Elk Hills?"

"Q. To your knowledge?"

"A. You asked about the development of oil. I answer that we got no oil in the Elk Hills."

"Q. Well, was not the fact that you had found no oil in the Elk Hills, and that you didn't know whether you ever would find any, the reason why you didn't develop those properties?"

"A. You don't suppose we expected to find it running out of the ground, do you? It costs money to find oil in any oil territory." (R. 390, 391)

Government witness, M. S. WAGY, testified as follows:

"Q. How many sections did you locate?"

"A. That has been a good while ago. I don't just remember the number. I can't recall now, just the number of sections. We took everything that looked good."

"Q. Did you locate any lands in 30-23 and in 30-24?"

"A. Yes sir."

"Q. About how many sections did you locate altogether?"

"A. To the best of my recollection I was interested in eight or ten sections. I can't be positive of that. I didn't keep any record of it." (R. 177) * * *

"Q. Isn't it a fact that the claims were relocated in 1903?"

"A. They might have been."

"Q. Were they not relocated in 1901 or so?"

"A. I haven't any knowledge about it."

"Q. Did you and your associates do all of the necessary location work?"

"A. I didn't do any." (R. 186, 187) * * *

"Q. You say that this blow-out that you have referred to was in Section 32, Township 30-24? Is that correct?"

"A. Yes sir." (R. 188) * * *

"A. We commenced at 30-24, at the corner down near the Headquarters Ranch." (R. 188) * * *

"Q. You found a blow-out in 26 of 30-23?"

"A. Yes, there was indications there." * * *

"Q. Did you locate on any sections adjoining it?"

"A. No."

"Q. You found a seep of 32 of 30-24?"

"A. Yes."

"Q. Did you find one in 26?"

"A. There was a disturbance there in 26 of sand or shale broken up that we were over."

"Q. In 30-23?"

"A. Yes, but I don't have any recollection of locating that land." (R. 197, 198)

Government witness, B. K. LEE, one of the locators and relocators, said:

"I found no oil sand in any portion of Township 30 South, Range 23 East." (R. 232) * *

"During the time I was prospecting in that

country, I went practically over the whole country from Taft to Coalinga. At different times, when I had the time and opportunity, I would go out and prospect for information." (R. 233, 234) * * *

"I found that the ground in that country was covered over one, two and three deep with locations by people who owned from eight to ten sections." * * *

"The greatest activity was shown in that country in the matter of locating claims in the latter part of 1899 and the spring of 1900. During that time the country was plastered for miles. Not only those who were experienced in oil, but those who knew absolutely nothing about it, went in there and located the entire country. A number of these locations were made at the Court House at Bakersfield." (R. 234) * *

I do not know any well in that township or in the Elk Hills that you would call a paying well." (R. 236)

Government witness, J. I. WAGY, oft repeated locator, testified:

"Q. How many of you were associated together in these locations that you made in 1900 or 1899?"

"A. Ten or eleven of us."

"Q. I understand you to say that you located fifty sections in all?"

"A. In the neighborhood of fifty. I believe it was a little bit more. We were not overlooking anything that we thought might be oil land." (R. 250) * * *

"Q. Where were these shafts dug?"

"A. I can't tell you the point now or the sections where they were dug." * * *

"Q. By Mr. Lewers—Do you know of any of these shafts revealing mineral?"

"A. I do not."

"Q. Never heard of it?"

"A. No sir."

"Q. So far as you know none of them revealed mineral?"

"A. Not to my knowledge." (R. 252) * *

"Q. You don't know of anything that was disclosed?"

"A. I do not." (R. 253) * * *

"Q. Then you did nothing but post the notices?"

"A. We did some work. We kept Lamont there three or four years."

"Q. What was he doing?"

"A. We considered he was trying to hold possession of the ground." * * *

"Q. Do you know of any discoveries that he made during that time?"

"A. No sir."

"Q. Of mineral of any kind?"

"A. I do not."

"Q. Don't you know as a matter of fact that he did not discover mineral of any kind?"

"A. I do not."

"Q. You never heard of his discovering any, did you?"

"A. Yes."

"Q. What did he discover?"

"A. Well, he told me that he had discovered oil formations in different points on the lands, and he had marked out on this map that I speak of where they were."

"Q. Did he discover any oil?"

"A. No." (R. 254, 255)

E. J. MILEY, experienced oil driller, witness for defendants, testified:

"I drilled a well on section 29, 30-22, the location where I first did my operations in 1900. There I drilled a well 3,520 feet deep, which we abandoned. * * * We didn't get a producing well." (R. 1712) * * *

"Q. What was the opinion of oil men at that time, if you know, prior to 1905, with reference to the Elk Hills being oil territory or not?"

"A. Why, it was never looked on as being classed worth spending money on in the development for oil at that time." (R. 1715) * * *

"Q. At the present time, Mr. Miley (1912), is there any oil being produced from any portion of Township 30-23, to your knowledge?"

"A. No. None being produced now."

"Q. And where is the nearest point to that from which oil is now being produced?"

"A. Well, to the nearest point would be section 19, 31-23 and section 13, 31-22."

"Q. And when were those wells sunk, if you know?"

"A. In Section 19, 31-23, the first producer was brought in. I think they actually got to producing in 1910. They were in oil there, they knew they had oil in 1909, but I don't think they got the production out of it until 1910."

"Q. Was there any oil being produced there prior to 1905?"

"A. No."

"Q. Now, prior to January 1st, 1905, as nearly as you can fix it from your knowledge of the country, where was the nearest place where oil was being produced with reference to the Township 30-23?"

"A. The McKittrick, in Section 29, 30-22." (R. 1729)

Government witness, H. P. DOVER, oil locator and operator, testified:

"I first went into the Elk Hills in 1903 or '04 for the purpose of locating oil lands." (R. 463)

"I judge it was sometime in May, or maybe later in 1903, when we made those locations." (R. 463) * *

"From 1903 to 1909 nothing whatever was done in the way of development work on those claims by me or my associates. I made no discovery of oil in 1903, or after that. They claim that they have got an oil well on Section 30 now. In 1903 or 1904, I did not know of any oil in the Elk Hills. I never saw any oil there, or other mineral; nothing but this blow-out (in 30-24) and we located the territory because of it." (R. 466)

Government witness, N. C. FARNUM, oil locator, testified:

"On the strength of the report I have mentioned as coming from Mr. Youle and on my own personal observations, we made locations in the Elk Hills. We located all of the land in T. 30-23, 30-24, 31-23, 31-24, that was not patented at that time. (R. 501) * * * We kept up the locations we made until 1906. (R. 502) * * * At that time (1904) it had no value as actual oil territory." (R. 510) * * * We located all the land we had in four townships. At least 42 sections. We didn't make a discovery of oil on any of them. We didn't know that any of them actually contained oil and we made all locations for the purpose of prospecting and developing that country for oil." (R. 514)

"I went over 30-23 very thoroughly and have no recollection of finding any oil seep in that

township. * * * I have no recollection of asphaltum reefs in 30-23. I have seen sandstone, what is usually termed a cap rock, that was discolored. Whether this discoloration occurred from oil that had been in it or not I never made an investigation. I saw that cap rock I think in 27 and 33 according to my recollection of it now in the south portion of Township 30-23." (R. 516) * * *

"I think we were the first to go over into the Elk Hills to locate except the men we bought out; we saw no evidence of anybody else being in there. That was in 1899." (R. 517)

Government witness, W. E. YOULE, one of the oldest and most experienced experts and operators, testified:

"The biggest wells in the world are where there is the least asphalt." (R. 553) * * * In California, the existence of oil sands is always a good indication of finding oil in paying quantities." (R. 556) * * *

"No man could tell until developed as to the existence of oil in any quantity." (R. 557)

"Geologists, scientific geologists—Le Conte—taught in some school that there was no oil in California, and gave a good reason for it. I know that you can get all the advice you want from geologists and from Bulletins that this is so and that is so, but you cannot prove it until you put

the drill on, and the drill has shown exactly what practical geology is. The drill has shown that it is very unsafe to say that there is not anything over there in those hills today at a reasonable depth."

"As a result of my long experience and operations and practical work in the field, I have not come to the conclusion that the opinions and theories of scientific geologists are entirely reliable. I have come to this conclusion that a lot of Bulletins that were written in those days, without the history of drilling that has happened since then, have proven that the geology of that date was not the geology of today. Geologists in those days, like Le Conte, made predictions that were not true; but geologists since then have found out their mistake and don't do it. I say, a geologist will say all those hills towards the Elk Hills and that whole country "There is good oil territory," but as to the depth, I don't see how they can tell. They endeavor to tell, but the drill is the proof of it. As a practical geologist, I would say that scientific conjectures with reference to the depth of formation have to give way to the actual test of the drill." (R. 564, 565)

ROBERT E. GRAHAM, practical oil driller and operator, testified:

"I didn't make locations in the Elk Hills because the country didn't look very good. It

looked pretty good from a structural standpoint, but I didn't find any oil seepage throughout the cropping of sand." (R. 2136)

"I never saw an oil seepage anywhere in the Elk Hills. I have seen what was called an oil seepage; it was not at all similar to the one in Township 11-20, in the Midway." (R. 2138) *

Government witness, COLON F. WHITTIER, testified:

"I don't know positively of any oil seeps in the Elk Hills." (R. 470) * * *

"All prospective oil land is not paying oil land and one cannot determine that without actually drilling wells." (R. 477)

Defendants' witness, SAMUEL SHANNON, testified:

"The opinion of my associates and acquaintances is unfavorable as to whether or not the Elk Hills are regarded as oil territory. I certainly would not advise anyone to invest any money in the Elk Hills at the present time in the hope of finding oil." (R. 2141) * * *

"I did not see any wells in the Elk Hills in 1909. I found a little oil sand in Section 32, 30-23, in the Elk Hills, which we assumed had every evidence of being an oil sand. I am not prepared to say that it was an oil sand. I visited that section and examined it myself, personally.

It had every evidence to me that it was an oil sand although it didn't have the same characteristics that you generally find in the West Side field in relation to oil sands, because it had nothing in it—it was absolutely dry." (R. 2142, 2143) * * *

Government witness, FRANK BARRET, oil land prospector, driller and producer, testified:

"I know where the Elk Hills are situated, in Kern County. I have visited them . I first went there in 1899. * * * I went through the Elk Hills and came back to the south of the hills, beginning at the East end of the hills, through what is now called Elk Horn Valley, to McKittrick. (R. 479) * * * I found two or three places where there had been seepages, and, of course, you could see twice as big as your hand on the side of the formation, where, perhaps all of the lighter properties had evaporated and you could see it there and scrape it off with your knife. It was not asphaltum; it was oil. Then I took some of the outcroppings home with me, and from the smell you could get just a little odor of oil, but when I crushed it at home and applied the chloroform test to it, I got traces of oil out of it. I wouldn't be positive that it was in Section 17, but I think it was, where I found the seepage. One of the Miller & Lux's men was with me to pilot me. He told me, I think, it

was in 17. It was in Township 30-24, near Section 23. (R. 479, 480) * * * At the time I was in there, I didn't know of any oil deposit underneath any portion of the Elk Hills. I only knew from surface indications and I believed they were there, but I didn't know they were there. I believed the country might produce oil, and I was examining it with reference to its character as an oil prospect. I knew of no discovery of oil in the township and heard of none. I could not have said "this is known oil territory." * * * "I have observed promising indications very frequently that didn't pan out. The oil business is a good deal like elections.* * * In one section on a well down 3200 feet and no oil; the next section to it, 250 feet, and good producer. A high-priced expert couldn't see a bit deeper into the ground than another. The oil doesn't always appear where they say it will. The true expert is the drill. You couldn't say that a territory is known oil ground till you put a drill in it. It is not known till it is proven." (R. 485)

Government witness, A. C. VEATCH, geologist and formerly chairman of Land Classification Board, United States Geological Survey, testified:

"I have stated repeatedly that I would not guarantee to any man going into the Elk Hills

that he would get commercial wells." (R. 883) * * *

"Q. In your opinion then—I am now asking for your belief—there is a large quantity of oil under the Elk Hills?"

"A. I believe so."

"Q. And at what depth?"

"A. I should say it may be under five thousand feet or it may be over."

"Q. In 1904 could that have been mined at a profit?"

"A. No." (R. 885, 886) * * *

"Q. You say "ultimately developed." Will you hazard a prediction as to when that would be?"

"A. No."

"Q. Will it be within the next ten years?"

"A. It is possible."

"Q. And it is possible that it may not be for twenty years?"

"A. It is possible."

"Q. Or a hundred years?"

"A. I think that is very remote." (R. 887) * * *

"Q. Mr. Veatch, in your opinion can the existence of oil be determined without drilling?"

"A. It cannot be proven in commercial quantities without drilling." (R. 902)

The Government, not relying upon its own former reports as to these lands, nor upon the affidavit of the

railroad based on information and belief, that the lands were non-mineral, ordered its own special agent, Mr. Ryan, to investigate the character of the lands, after the railroad applied to select them, and in his report of January 22, 1904, Ryan states:

> "Found no oil seepage, oil springs, surface, or other indications of oil or minerals of any kind that would tend, in my opinion to warrant said lands being classed as mineral in character." (R. 1550, 1551)

That the existence of valuable oil deposits in unimproved and undeveloped land cannot be proven by geological opinions, has been well established in this case by the Government.

Plaintiff's Exhibit "O." above mentioned, pre-

EXPLANATION:- The reduced plat of Plaintiff's Exhibi
"O" in a separate envelope accompanying this brief
contains territory in the McKittrick and Midway Oil
Fields, not shown on the above mentioned plat which
accompanied appellant's condensed statement, not re-
printed; so that the above calculation of the number
of "drilled wells," "producing wells" and "dry holes
having been based on said smaller map is incorrect a
to such wells upon exhibit "O" accompanying this bri

The calculated number of wells and areas upon exhibi
"O" accompanying this brief is as follows:

Total number of wells drilled - - - - - - - - - - -	77
Total number which have produced oil or gas - - -	40
Total number of dry holes - - - - - - - - - - - -	37
Total supposed oil field in acres - - - - - - -	116,00
Actual area of oil land proven by drill at five acres per well, acres - - - -	2,02

ducing oil or gas, and all other wells, not producing, marked as idle or incomplete, are indicated by round circles. This reduced plat shows upon the 116,480 acres a total of 357 drilled or drilling holes of which 147 have produced or are producing oil, or gas, and 210 have not produced or are not producing oil. All but three of the 147 marked as "producing oil" are in the Midway Field southwest of Elk Hills. The area of productive or proven territory covers about 4000 acres or 1/29 of the whole field indicated.

Plat "O" further shows that, in the McKittrick field at the northwest corner of the plat, there are nine wells to forty acres, or about 4½ acres to the well.

In the whole "oil territory" on Exhibit "O," there ought to be over 25,000 producing wells, but in fact there are only 147 oil wells and 210 dry holes. According to this exhibit and testimony, of geologists, if Martin made 29 predictions as to where oil would be found, he would not be right more than once.

Government witness, JOHN CASPER BRANNER, professor of geology at Stanford University and an eminent geologist, testified:

> "In passing upon the character of the Elk Hills, I did not determine in any way the quantity of oil and made no attempt to do so. I could not have done so from the examination I made. That could only be determined by putting down wells. One well might determine the matter and

it might not. Development is required to determine whether or not that is a valuable oil deposit." * * *

"A geologist does not determine the economic value of the land for oil. All he undertakes to do is to say whether or not the land has prospective value. * * * I could not, when I first examined the land, have given an assurance that oil in valuable quantities could have been found." (R. 1007, 1008)

Defendants' witness, FRANK M. ANDERSON, oil geologist, graduate of University of Oregon and of Stanford University, testified:

"It obviously is impossible for any geologist to look into the ground below the surface very far. He might infer various things and come to some kind of conclusions, but he certainly cannot reach a sound conclusion that a given piece of land will be oil producing, without actually drilling it."

"Q. By Mr. Lewers—Well, will drilling it be sufficient to determine the problem?"

"A. It will not be sufficient to determine the problem of its commercial value. Its commercial value cannot be determined by drilling alone. * * * The final and ultimate test of the value of oil land is the actual production over a period sufficient to recover all costs." (R. 2548, 2549)

"Q. Was there anything known, as far as

your knowledge was concerned, in 1903, of any gas in the Elk Hills?" * * *

"A. Why, certainly not, for the wells were not drilled at that time." (R. 2721)

Defendants' witness, J. A. TAFF, geologist, formerly in the service of the United States Geological Survey, testified:

"Q. Now, Mr. Taff, that seepage in Section 32 of 30-24 to which you have referred at some length is, in your opinion, a gas seepage, I take it, from your direct testimony?"

"A. It is not."

"Q. You think it is not a gas seepage?" *

"A. I didn't observe any seepage at all." (R. 2843, 2844)

He further stated:

"There is not any seepage or asphaltum indications anywhere in the Elk Hills that I know of." (R. 2766) * * *

"A man standing at McKittrick after going over the Elk Hills if he is a geologist, would know the character of the structure of the Elk Hills. Looking at the development at that time (1904) or even at the present time, would not by any means enable him to conclude the oil or non-oil character of the Elk Hills. The fact of the case is that at the present time along the McKittrick anticline opposite the Elk Hills, all attempts at drilling have failed." (R. 2780)

FRED KIMBLE, oil operator, testified as follows:

"Have been interested in the oil business for about 12 years, first at Coalinga. * * * I never heard the Elk Hills, among oil men, considered possible oil territory, prospectively speaking, until after the Honolulu well came in, (1909), and then that started a good many prospectors to thinking that the Elk Hills might be oil land, being apparently similarly situated. (R. 2116, 2117) * * I did not make any locations in the Elk Hills or attempt to. I am familiar with the impression amongst oil men as to the character of the Elk Hills. That impression is that it is not oil land, commercially speaking. We consider that it has been demonstrated not to be oil land by reason of the large proportion of failures, and the depth they have gone without success." (R. 2118)

Kimble described eight wells he drilled for oil in other places which were failures excepting one, which produced for a time, fifty barrels a day. R. 2118, 2119)

He further testified:

"In spite of the dry holes, I have been ahead of the game. Of course, I have made it on land but not in drilling wells. In selecting oil lands, I have been successful; in drilling oil wells, I have been unsuccessful." (R. 2119)

* * * * * * *

"At the time I was in the Elk Hills in 1910,

the work there was just starting. There were no rigs up." (R. 2121)

* * * * * * *

"Of course, to know what a well would amount to, we would like to see it produce maybe for thirty days, or something like that, to see how it holds up. I have known wells that started off nearly that good and were afterwards abandoned." (R. 2121-2122)

Government witness, J. W. KAERTH, who formerly was employed in 1901 as surveyor to survey lands in Township 30-23, testified:

"I had occasion to go to every portion of the township covered by that contract made with Jas. M. Duee, in 1901. My recollection is we completed the survey near the middle of December. To the best of my recollection our camp was in Section 33 of that township, and on the south slope of the Elk Hills. I found evidences of oil and asphaltum over a good portion of that township. I found those ridges or reefs. If I were going to describe them as they appeared there, I would say that they had very much the appearance, as I remember them of an ordinary ledge of sandstone. (R. 420) * * * If Iwere going to specify where we found the oil seepages, I would say near the south line of Section 17, and near the south line of 25. I was going to say

that whatever we found was usually close to the section lines, because we did not get off the lines very far. * * * According to my recollection, the oil seep in 25 was in the NW¼. I remember it as being near the SE¼ of Section 25. That oil seep was just a small spot there in the bottom of the gulch, in a depression; just a small black spot in the soil, that had the appearance of oil. * * * I was last on the ground when I left that survey, and have never been back since." (R. 421)

* * * * * * *

"Q. Could you, Mr. Kaerth, spend the time to go out to the Elk Hills immediately and make an examination?"

"A. What is this? Wednesday?"

"Q. Yes."

"A. I think so."

"Mr. Lewers—Very well. We will be very glad to make the arrangements. That is all." (R. 423, 424)

On the next day after the above examination of Jacob Kaerth and after he had promised to immediately point out the lands where he found or claimed to have found asphalt and oil sand, the following colloquy was had between counsel, in which appellants claim that Government counsel admitted that Kaerth had left the vicinity of the court, and could not be recalled without issuance and service of subpoena:

"Mr. Lewers. Before you call the next witness, I desire the record to show that after the witness Jacob Kaerth yesterday on the stand announced that he was willing to immediately go out into the Elk Hills with a representative of the defendants in this case, and after he left the stand we endeavored to make arrangements with him to go out there and point out the places where he found the ledge of asphaltum, or reefs, and oil seeps in Township 30-23, he having testified that the asphaltum reefs, as he called them, existed in numerous places in that township. That after leaving the stand, in response to our request to go out there and show our representative, he stated at first that he was willing to do so.

"Mr. Mills—I want to interpose an objection to this gossip and tittle-tattle. If counsel wants to be on the stand and sworn and give us an opportunity to cross-examine him, we are perfectly willing that he make any statement he wants to. But this idea of testifying into the record from the mere statements of counsel, we shall object to as improper and entirely hearsay."

"Mr. Lewers—I understand the reason for the objection. After stating first that he was willing to go, he later informed us after conference with the attorneys for the Government that he declined to go."

"Mr. McCormick—We want to put in a further objection and ask that it be considered as

made at the time Mr. Mills made the objection that Mr. Kaerth is a witness and testified where he lived, and the process of the court is open to the defendant to subpoena him."

"Mr. Lewers—All I know is he was willing to go at first and changed his mind for some reason." R. 459, 460, 461.)

Government witness, IRA M. ANDERSON, testified:

"In 1899 and 1900 we went to Section 2, the section that cornered on Section 34, Section 2 being in Township 31 South, Range 22 East. I found asphalt in there and oil sand. (R. 155) * * * It is up there in the northeast corner of Section 26, Township 30 South, Range 22 East, and on Section 22 in the same township and range. I have seen deposits of asphaltum or brea north of that in this range of hills called the Elk Hills on this exhibit "I." * * I have gone to this deposit from the headquarters ranch and in doing so travelled southeast. I first saw this deposit in 1900, when I first came in the country. * * * When I first went into that country I knew nothing about the Elk Hills. It was always called the Buena Vista Hills by me. I never heard of the Elk Hills until the last few years." (R. 162)

B. T. DYER, field manager for the Central Petro-

leum Company and experienced oil operator, testified:

"I know of instances where men who were considered to be expert geologists have predicted the discovery of oil in different places at given depths and where the development following their advice has failed to reveal any oil although the wells had gone much deeper than originally planned." (R. 2052, 2053)

* * * * * * *

"When I first went into the Elk Hills to look after the supposed seepage I did not know that Mr. Ochsner was going with us, but we thought he would be able to give us some advice. We took a sample of the seepage. This material was black. I do not think it was an oil sand and I do not think that I have ever seen an outcropping of an oil formation anywhere in the Elk Hills, although this looked like what you would call a seepage from an oil sand. Mr. Ochsner reported that this material had nothing to do with oil." (R. 2054, 2055) * * *

"I do not think that the lands involved in this suit can be called oil land because I do not believe that oil can be obtained within a practicable working depth." (R. 2056)

FRED H. HALL, experienced oil driller and operator, testified:

"The only way to absolutely determine the

presence of petroleum is by drilling a well, but attention should be paid to geological formations and physical evidence on the surface of the ground in determining where to begin drilling." (R. 1825, 1826)

Government witness, CHARLES BRISCO, oil explorer and locator, testified:

"Mr. Owen did not tell me that he knew there was oil at the place where I had my location or that he knew there was oil in that part of the Elk Hills. I have seen brea deposits that didn't show by future development the existence of oil but in my experience, wherever you find brea it is an indication that there is an oil belt there or near there somewhere and it has been oozed out there by the gas. It may be a mile or it may be a half mile or it may be right there and it may come straight up. That is my experience in brea. I have known wells to be sunk near those deposits and off to the side to some distance and yield no productive well." (R. 341) * * *

"Mr. Owen on that trip took dips and samples and so on. That was his business. He told me he thought the territory was very deep and I had no reason to doubt his statement and that was the impression of everyone. I don't know of any person at that time that actually knew of the existence of oil in the Elk Hills." (R. 342)

Government witness, I. N. CHAPMAN, formerly government surveyor and experienced as an examiner of mineral lands, testified:

"I surveyed the east boundary of Township 30 South, Range 23 East. * * * This work was done about 1893. * * * It is all the right formation to find oil. (R. 315) * * * When I went down and made the survey on the east line of the township it impressed me as ground that probably might contain oil. * * * It is a kind of gamble when you look for mineral anywhere because you have to find it. From such indications as I saw there a man would not be justified in denying that there was oil there because a man would not bore where the surface indications were not there. He would be governed by surface indications. I couldn't say that a man would be justified in saying that from what he observed as to surface indications that the land contained oil in paying quantities." (R. 316, 317)

C. A. BARLOW, experienced oil operator, testified:

"I would rather take a practical operator's opinion of an oil territory than that of any geologist I ever saw. * * * I have good reason for saying this because I know that the Kern River field was turned down by every geologist who examined it and yet a wonderful oil field was

developed there. The locators who hired geologists during the excitement at Kern River were all advised by these geologists to go northeast from the discovery up toward the river. They got no oil there at all and the other fellows who went out into the field and took what was left to the northwest got the Kern River field."

"Our withdrawal from the Elk Hills was not due to financial difficulties." (R. 2009)

* * * * * * *

"If he is operating on unproven territory, any man is a fool to pretend that it is below there for a certainty. * * *

"No man in drilling an oil well can say to a certainty that oil exists at a certain point, because right in the heart of proven territory, with wells all around, I have drilled absolutely dry holes away below the depth at which the oil had been found." (R. 2015)

JOHN A. POLLARD, experienced well driller, testified as to the first discovery of oil in the Buena Vista Hills country in what was called the "Honolulu" in Township 32, Range 24, south of and about six miles from the nearest of the lands in suit:

"This discovery was made on February 2, 1910."

"The immediate result of this discovery was a considerable commotion in that section of the

country and to the north and west particularly." (R. 1994)

Government witness, SAMUEL P. WIBLE, banker and oil land owner, testified:

"I know what is called the Elk Hills just east of McKittrick. I first saw those hills in the fall of 1893. (R. 318) * * * I heard that there was a seepage there but I didn't know just where it was but I saw it afterwards. It was on Section 32, Township 30 South, Range 24 East. It is not what you call an oil seepage; it is what you call a brea bed. Evidently oil or gas had been in it at one time and dried out at the present time." (R. 318, 319) * * *

* * * * * * *

"As a man of experience in the oil fields I would not make a location of land which had no indication of mineral value on the ground at that time. The mere fact of a location is no criterion as to the mineral value. In 1900 and 1901 locations were made on lands that subsequently developed to have nothing in them whatever." (R. 327)

"You cannot determine whether particular territory contains oil until you develop it. The indications on the surface, such as gas, blow-outs, brea or oil sands, do not always show that there is a producing bed below that. The presence of

brea, or oil sand or gas or blow-outs is only an indication. I have had some experience in lode mining and frequently promising indications do not pan out at all and that is true in the oil business. Mr. Owen said he believed the Elk Hills might contain oil. He said the oil measures lay under them and he thought that they were probably so deep they couldn't be reached and made to pay." (R. 327, 328)

(2) TESTIMONY IN THIS CASE SHOWS THAT EXPERIENCED OIL MEN AND DRILLERS DID NOT GENERALLY ENTERTAIN EVEN THE OPINION THAT THE ELK HILLS DISTRICT CONTAINED VALUABLE DEPOSITS OF OIL OR WERE VALUABLE AS WORKABLE OIL LANDS; and SOUTHERN PACIFIC AGENTS DID NOT EVEN BELIEVE THEY WERE OIL LANDS.

The reports and maps made by J. OWEN, geologist for the Southern Pacific Company in Texas and California in 1902, before there was any contest over these lands, show that he did not classify any of the lands in suit either as oil territory or as probable oil territory. (R. 1615, 1632)

FRANK M. ANDERSON, scientific oil investigator and expert, testified and shows in detail that a well in the McKittrick District 3600 feet in depth, would cost $60,000.00, and if it produced continuously one hundred barrels a day with the price of oil ranging as it did from fifteen to twenty cents a bar-

rel in 1904, that it would require ten years to retire the debt of $60,000.00, and he further states that the average commercial life of an oil well is five years. (R. 2522, 2523)

He further testified:

"Q. Well, now is not that the real reason why you did not recommend the lands to be included in the revised list of the Kern Trading & Oil Company, was because you did not have sufficient knowledge to make a recommendation?"

"A. No. The real reason is that I thought they were not oil lands." (R. 2728) * * *

"I think that nothing has yet been proved commercially valuable in the Elk Hills, or valuable in any way, that would upset my original conclusion that the land was not commercially valuable for oil." (R. 2732)

Anderson further testified:

"I didn't state that the geologist could not determine the structure. He can determine the structure. But he cannot determine the oil contents, or if the land contains oil at all, until it is actually drilled, and the finding of oil in the Elk Hills in the positions in which it has been found is no basis for a conclusion that it will be found in any adjacent section of land." (R. 2550)

He further testified:

"Q. Don't you know, Mr. Anderson, and aren't you fair enough now to state, that any competent geologist, standing on the McKittrick

front there, knowing that line of seepages from Temblor down to Sunset along the eastern flank of that range, and knowing the anticlinal structure of the Elk Hills, would not know his business unless he at once believed that those lands were favorable for the accumulation of petroleum?" * * *

"A. You are assuming that he knew those things and that these conditions existed along the flank of the Temblor Range—he knew them. Now, I presume an answer based on presumption would be sufficient. If I was in the vicinity of a populous city, on a hill surrounded by a blue fence and containing monuments or wooden and stone slabs on which were engraved the names of deceased men and women, I would think this was sufficient evidence that this place was a cemetery, without having the bones dug up and the skeletons identified. Now, the Elk Hills look to me today to be exactly in that class of things; it looks like a cemetery of disappointed hopes." (R. 2735, 2736)

Mr. Anderson further testified:

"Mr. Watts in his bulletin by the State Mining Bureau referred to quite a number of the districts that he considered prospective oil districts. * * * Mr. Watts referred to such districts as Moody Gulch in the Santa Clara Valley and Purissima oil district, Half Moon Bay and Matol district, Humboldt County. * * * and sev-

eral others in which there has been no development since."

"Q. In any of the literature of that kind did you find any reference to what are now known as the Elk Hills as being oil territory?"

"A. No, I did not. I searched the literature then extant on the geology of this region, and I believe that as far as I have been able to discover (and I searched it pretty exhaustively) no reference was ever made to the Elk Hills. * * * When the United States Geological Survey published Bulletin No. 4 and Bulletin No. 6 (Bulletin 406) Those contained the first reference to the Elk Hills or to that district that I have ever seen in print in any standard geological literature or any other." (R. 2378, 2379, 2380)

Defendants' witness, E. T. DUMBLE, consulting geologist for the Southern Pacific in Texas and in California.

Referring to an examination of lands made by himself and Mr. Treadwell in 1902. (R. 2904)

The witness states:

"The Elk Hills were not then discussed specially, unless the little anticline there on the railroad would be called "Elk Hills." He called my attention to that anticline as a geological matter, but there was no question as to its being oil land. The oil possibilities of the Elk Hills was not mentioned, and I did not consider them myself

as oil territory. The indications at that time were, that from this sharp anticline, there was practically no chance of an extension of the oil field in that direction. The sharp anticline I have mentioned is shown on the map just in evidence. It runs through Sections 12 and 13 in 30-21, and through 10, 19, 20, 29, 27, and 34 in 30-22, and 2, in 31-22." (R. 2904, 2905)

* * * * * * *

The witness further testified:

"The lands in Township 30-23 had never entered into my mind as oil land at all. The conditions around McKittrick all seem to me to preclude the possibility of oil occurring that far away from the outcrop." (R. 2928)

Referring to the statement of Thomas J. Griffin that Mr. Dumble had on a train with him passing north of Bakersfield and that Dumble pointed out to the west an alleged oil field, Mr. Dumble testified:

"I was in San Francisco until the 12th of December, 1903, when I left for Houston, where I remained until January 20, 1904, when I returned to San Francisco accompanied by my family. We came over the regular route from Houston to San Francisco, did not pass through Bakersfield or the Kern River field. I did not, during 1903 or 1904, in coming from Houston to San Francisco, pass through Bakersfield. I did pass through there on trips in 1901, and possibly in the earlier trips of 1902."

"I have met Thomas J. Griffin. He did not accompany me from Houston to San Francisco on the trip of January 20, 1904." (R. 2928) *

"I never had a conversation with Thomas J. Griffin respecting any of the lands in Kern County and particularly the lands on the west side, near McKittrick, in the spring of 1904, at the Rio Bravo property at Sour Lake in Texas, about twenty miles northwest of Beaumont, or at any other time or place. If Mr. Griffin testified that a conversation came up over the Rio Bravo well No. 107, and that we were at that well discussing the depth of the first strata of oil that was struck where there was a gusher, and as to the probability of striking a lower strata, and the gravity of that oil that we might strike at the lower strata, and that I began to tell him about the low gravity of oil in Kern County, of the Kern field, and Sunset and McKittrick, and that I would like to find an oil of that low gravity as it would be much better for fuel, and not so much danger of fire, and would like very much to find it, or suggested that if well 107 quit flowing or quit producing that I was going to take it up with New York and get an appropriation from there to deepen that well and go down and make a test of it, it is not true. * * * there was no conversation in which I said, 'We own a great deal of that land, a great deal of it we have not yet

taken patents on, but we expect to.' " (R. 2968, 2969) * * *

"Q. Did you ever have any conversation with Thomas J. Griffin on a train in California?"

"A. I never did. I never made such a statement to any one. I was never in the Elk Hills or on the lands in 30-23, that is in controversy in this suit. Up to the time that the patents were issued there had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson." (R. 2971)

Referring to the proposition to lease some of these lands to the Kern Trading & Oil Company, Mr. Dumble said:

"I did not have a remote suspicion at that time that those lands were believed to be mineral. I had no reports that these lands were mineral and I was not trying to jam that patent through." (R. 2988) * * *

"Personally, I had nothing to do with the selection. My idea of them as oil lands was that they were of no value whatever, and that they had no value except as agricultural lands. Mr. Owen's examination of them was a very brief reconnaissance, but our idea from the beginning was that they were not oil territory." (R.3014)

JOHN P. KERR, experienced oil operator, testified:

"Have been engaged in the oil business for about 15 years. * * * In recent years I have

had charge of the Land Department of the Chanslor-Canfield Company. It is my duty to report on all territories and to go to and buy, lease and operate prospective oil lands." (R. 2122, 2123) * * *

"I went over to the Elk Hills. I have been there a number of times since 1901 and have been over pretty nearly all of it for the purpose of examining the lands to see whether I thought we wanted any of them or not for oil purposes. In 1901, I stayed out there about 7 months, on the slopes of the hills on the Midway side; and then I was over all the land and went from there across into the Elk Hills and through there; I didn't see anything that I thought we wanted to spend money on. (R. 2123) * * * I came to the conclusion that the Elk Hills country was too much of a 'wild cat' for us to tackle." (R. 2124) * * *

"I never thought it was oil territory. I believe it was too expensive to operate if it was oil territory. I thought it would be too deep. I did not think it was oil territory and I now think it is very doubtful as to whether it is or not." (R. 2125) * * *

'I would not consider a well four thousand feet deep that yielded 406 barrels for a couple of days and then dropped down to 20 barrels a day, a profitable well. A well ought to be tested between thirty and sixty days to determine whether

it is a commercial proposition or not." (R. 2129)

Government witness, LUDOLPH G. SARNOW, oil driller and operator, testified:

"I don't remember of any competent geologist who recommended the Elk Hills as a place that would be worth prospecting for oil." (R. 141) *

"The general impression was that with the appliances then existing anything beyond 1200 to 1400 feet was looked upon as economically impracticable. A 4,000 foot well would have cost a fortune in casing alone at that time and would have been regarded as prohibitive." (R. 144)

ROBERT E. GRAHAM, practical oil operator and driller, testified:

"I didn't make locations in the Elk Hills because the country didn't look very good. It looked pretty good from a structural standpoint, but I didn't find any oil seepages throughout the cropping of sand." (R. 2136) * * *

"I never saw an oil seepage anywhere in the Elk Hills. I have seen what was called an oil seepage there; it was not at all similar to the one in Township 11-20 in the Midway." (R. 2138)

U. S. WAUGH, oil operator, testified:

"I know the Hills called Elk Hills very well, and so far as my conversation with oil men is concerned, it was generally considered that it

was very doubtful whether the Elk Hills were oil lands; in fact they didn't consider it as an oil field at all, or that there was a possibility of getting oil there." (R. 2146, 2147)

CHARLES A. HIVELY, an experienced oil man, testified:

"During the time I was in McKittrick, from 1900 to 1905, my recollection of the Elk Hills property was that it was of no value." (R. 2161)

Defendants' witness, FRED H. HALL, testified:

"I am engaged in the oil business." (R. 1822)

"I am familiar with the Elk Hills and believe that I was in them first in 1901 for the purpose of looking around, as we were then hunting for oil land to locate. We did not make any locations in the Elk Hills at that time, however. From 1900 up to 1905, I was familiar with the general impression of practical oil men in that field as to the limits of oil territory. The general opinion at that time was that the oil bearing territory was confined to the small strip from McKittrick west or northwest and a small territory around Maricopa and around Twenty-five Hill. I think they considered the oil bearing territory as extremely limited. The general belief was that the territory between McKittrick and Twenty-five Hill was not oil land.

"During this same time it was generally con-

ceded that the Elk Hills were not oil territory. At that time I would not have invested any money in a well in the Elk Hills and would have thought that a man who went in there to start a well at that time was either more reckless or had more nerve than I had.

"I think that development in the Elk Hills commenced about three years ago. * * *

"I do not consider the Elk Hills to be oil land today." (R. 1824, 1825)

JOHN A. POLLARD, experienced well driller, testified:

"As a result of my experience in the oil business and upon my knowledge of the Elk Hills country and the Buena Vista Hills and the surrounding country and my observation of what has taken place there, I would not advise a man who had capital to invest in the Elk Hills with the hope of finding oil in paying quantities. Oil men generally disregard the Elk Hills and think that it is not oil bearing territory.

"I am familiar with the general opinion concerning the Elk Hills and I have confidence in the men who drilled wells there and from my own knowledge I would not want to invest any of my own money in that locality." (R. 1995, 1996)

Defendants' witness, D. S. EWING, oil operator and owner, testified:

"I made no geological examination in the Elk Hills. I am not a geologist. I was looking for outcroppings of sand or other indications of oil, and found nothing that attracted my attention or fancy at that time to make me think there was oil there. I made no locations there, and didn't think there was oil there, and I have not changed my opinion since that time." (R. 2251) * * *

"I went into the Elk Hills within a very short time after I arrived in McKittrick in 1900 or 1901. I went out as a great many others did at that time for the purpose of looking over the Elk Hills to see if it would, in my judgment, justify the making of mineral locations for petroleum." (R. 2253)

L. E. DOAN, oil operator, testified:

"I have a general idea of the Elk Hills. I went there first, I think in 1901 or 1902, when I was operating at Sunset." (R. 2069) * * *

"I was familiar with the general impression amongst oil men in that country at that time as to where the oil was. The general belief was that it lay close to the outcrop along the Temblor Range along the west side of the valley. The general impression as to the Elk Hills at that time was that there was no oil there or if there was any it was very deep, and with the methods of drilling in vogue at that time nobody thought it

would be profitable to go out into that country at all." (R. 2071) * * *

"I do not think that the Elk Hills is oil territory in the sense that it can be worked at a profit. A well 4,000 feet deep is not a profitable venture for any man unless it turns out to be a tremendously big well. By a big well I mean a gusher with an enormous depth of sand, and all that sort of thing, plenty of reserve to keep the well alive for a long time. Even the wells in the Buena Vista Hills, in the Midway, that came in at a thousand barrels a day, it is questionable in my mind whether they will ever pay." (R. 2072)

JAMES A. OGDEN, oil locator in the Elk Hills, testified:

"I was first in the Elk Hills about 1895 and have been traveling over them from time to time during the eighteen years I have been in that country. * * * I had some locations at one time in the Elk Hills." (R. 1982) * * *

"We did nothing with these locations. I think I put up a few dollars to pay the expenses of recording the notices but that is all.

"At the time when these locations were made, I cannot say that I considered the Elk Hills to be oil land, as I thought very little about it. I was not an oil man and the other men simply used my name and I let it go at that. None of these loca-

tors were oil men, as far as I know, but they were all greenhorns in that business.

"At that time I had not heard any oil men discuss the Elk Hills as possible oil land but there were a great many people going in and locating land there. They put up no derricks and the only work done was to dig a hole here and there or fix a crossing to allow a wagon to go over a gulch. The first actual development work in the Elk Hills began about three or four years ago. Two years ago there were a number of rigs working in there but at the present time there is not one." (R. 1983)

H. H. McCLINTOCK, purchasing agent and land examiner for oil companies, including Standard Oil Company, testified:

"I am familiar with the Elk Hills as I surveyed a part of that country in 1904 and from that time until 1910." (R. 1974) * * *

"From 1904 up to 1909 the Elk Hills were not considered by oil men to be oil land. I was in touch with all the oil men in the district at that time and never heard the Elk Hills discussed as oil land prior to 1909. * * *

"The first actual drilling operations in the Elk Hills in Township 30-23 commenced in 1909." (R. 1974, 1975) * * *

"In my opinion the Elk Hills cannot be considered as oil land at the present time. I say

this because I have personal knowledge of wells as deep as 4600 feet that are apparently barren and it does not look as if there was much chance below that depth because we do not know how to go much deeper. A well 4,000 feet deep in that territory would cost about $60,000 without counting the cost of water and fuel lines." (R. 1976)

Government witness, JOHN JEAN, testified:

"I lived in Bakersfield in 1900; from October 1899 to 1900. While I was living in Bakersfield, Charlie Lamont showed me some oil sands purporting to have been brought from the Elk Hills. He took me out where these oil sands were found. * * * I struck the oil sand. It was a black, coarse sand; dry oil. I think we struck about three feet of oil sand, three feet in depth. * * * I looked like dry oil, burnt sand. That was southwest from the Miller & Lux Headquarters Ranch on the canal. I don't know what township and range it was in. That was in 1899." (R. 127, 128) * * *

"Mr. Sarnow said it looked good but he thought it was deep territory and very expensive. On the strength of that discovery, I with others, made locations of the lands about there. My associates were Mr. Sarnow and Mr. Treadwell. Think we located on Section 21, near the oil seep. * * * I think we located one sec-

tion. We made no other locations." (R. 128, 129) * * *

"I never did any work on my locations. * * * Beginning just to the west of our locations in Section 31, Township 30 South, Range 24 (the lands in suit are 30-23) and extending over a distance of six miles to the west, I heard W. E. Youle speak of that territory." (R. 131, 132) *

"He said light oil runs there. I don't know about the township and range by 30 South, 23 East, but he told me it run from hill to hill. Specifically, he said it ran from Sunset to McKittrick and from Sunset up into the Elk Hills. * * * He never told me about the Elk Hills, but just said it run from hill to hill. * * * He did tell me if you go into the Elk Hills you will find oil anywhere north of the line between Sunset and McKittrick. I don't remember that he told me oil had been discovered or was known to exist anywhere north of that line." (R. 132)

Government witness, SAMUEL P. WIBLE, banker and oil land owner, testified:

"I know what is called the Elk Hills just east of McKittrick. I first saw those hills in the fall of 1893." (R. 318) * * *

"As a man of experience in the oil fields I would not make a location of land which had no indication of mineral value on the ground at

that time. The mere fact of a location is no criterion as to the mineral value. In 1900 and 1901 locations were made on lands that subsequently developed to have nothing in them whatever." (R. 327) * * *

"You cannot determine whether particular territory contains oil until you develop it. The indications on the surface, such as gas, blow-outs, brea or oil sands, do not always show that there is a producing bed below that. The presence of brea, or oil sand or gas or blow-outs is only an indication. I have had some experience in lode mining and frequently promising indications do not pan out at all, and that is true in the oil business. Mr. Owen said he believed the Elk Hills might contain oil. He said the oil measures lay under them and he thought that they were probably so deep they couldn't be reached and made to pay." (R. 327, 328)

According to this reliable Government witness, who conversed with Mr. Owen, the Southern Pacific geologist, Mr. Owen did not even entertain the opinion that the lands in suit would ever produce oil in paying quantities.

Government witness, CHARLES W. EBERLEIN:

The undisputed testimony shows that Eberlein never saw the lands in suit at any time. He had no personal knowledge whatever concerning them. His

ignorance of oil development and of the law led him to the preposterous conclusion that leasing lands in the vicinity to prospect for mineral and extract it, if found, would prevent the Railroad from securing *other lands* under its grant, near by, not known to be mineral.

Eberlein testified as follows:

"A. George A. Stone had been for years the field examiner of the Southern Pacific Railroad Land Department. He was thoroughly familiar with the land, so he told me.

"Q. He made no special trip on that occasion?

"A. Not on that occasion.

"Q. To ascertain the mineral or agricultural character of the lands?

"A. No.

"Q. Did you know anything about the lands yourself?

"A. Nothing.

"Q. Did you have any personal knowledge whatever?

"A. Absolutely none.

"Q. Had you ever seen the land?

"A. Never." (R. 1088) * * *

"Now, I ask you whether at the time you came into the land department of the Southern Pacific Railroad Company, defendant, which you stated was about August 12th, and during the same month this selection was made up, you had

any specific knowledge of these particular lands at the time that list was made?

"A. No sir. It would be impossible for me to have had." (R. 1291) * * *

"I would not have known them if I had been told. It must be remembered that I was as green about the land affairs of the Southern Pacific, almost, as it was possible to be. I had given no attention to land matters particularly. I had been engaged since I came there in organizing the land accounts bureau, getting the machinery ready and set in operation that I was sent there to do, and what you are talking about was something that had not occurred at that time." (R. 1292)

Defendants' witness, W. H. OCHSNER, geologist, testified:

"I don't think that with a knowledge of the outcroppings of oil sand in the Elk Hills, known to exist prior to 1904, when considered in connection with the anticlinal structure of the hills and with the development along the McKittrick front and down along the line of the eastern flank of the Temblor Range, a competent geologist would, without further study, be warranted in advising an investment of money for the purpose of attempting to produce a paying oil property there. I think that an opinion which in-

volves the expenditure of money should have complete study, should be concerned with not only seepages, but all the geological data that might be gathered from a long and detailed piece of work." (R. 2211) * * *

"I have seen enormous asphaltum deposits where no oil could be found by deep wells put down in the most favorable localities in the vicinity. Seepages and asphaltum deposits cannot therefore be regarded as unquestionable evidence of the existence of petroleum in the adjoining sections." (R. 2238)

(3) THE UNITED STATES WAS FURTHER OR BETTER INFORMED AS TO THE MINERAL OR NON-MINERAL CHARACTER OF THIS LAND, PRIOR TO THE PATENT, THAN THE SOUTHERN PACIFIC COMPANY, AND ISSUED THE PATENT UPON ITS OWN INVESTIGATIONS AND REPORTS.

The allegations of the bill that the Government was not informed as to this land, and that the railroad company falsely concealed and misrepresented its true character, and that the Government issued the patent without knowledge, are not supported by the evidence, but are shown to be untrue in fact:—

(a) For several years prior to the patent of Dec. 12, 1904, the Government made numerous reports and printed, by authority of Congress, numerous documents and bulletins concerning the oil and asphalt deposits of California, and, during that entire period, kept adrift with oil developments, new discoveries of oil territory and value of oil products.

The geological condition and extent of scientific knowledge concerning the Elk Hills district in California, has continued to be the subject of investigation and report by Government publications issued from time to time, both before and since the survey of public lands in that district.

Some of these reports are contained in bulletins issued by the United States Geological Survey, and some are contained in Congressional Documents, printed by order of Congress for the information of members and of the public generally.

The courts will take judicial notice of matters of general notoriety, such as the history of the times, and matters of scientific knowledge, and especially where published by authority of Congress.

In United States v. Whitridge, 197 U. S. 135, 145, 146, the Supreme Court held that it would take judicial notice to avail itself of information contained in the Herschell Report on the coinage of silver in India, and which report was printed in a publication of the Government authorized by resolution of the Senate and House. See also:

Binns v. United States, 194 U. S. 486, 495:

It is a general rule that the Federal courts will take judicial notice of public records, both those published and those on file in the departments, relating to the history of the times, matters of general notoriety, matters of scientific knowledge, and matters relating to political history including important acts of the executive, judicial and legislative departments.

Caha v. United States, 152 U. S. 211, 221, 222:

We therefore assume that the court may and will desire to avail itself of the following Government publications, in order to be informed as to the scientific development in the Elk Hills country, and in regard to the history of the times appertaining to that section.

(b) In the Twenty-Second Annual Report of the United States Geological Survey for the year 1900-1901, which report was issued by the Government Printing Office of the United States in the year 1901, *three years before the patent in suit issued,* there is a report by George H. Eldridge entitled "The Asphalt and Bituminous Rock Deposits of the United States." Pages 365 to 452, inclusive, of this report are devoted to a discussion of asphalt and bituminous rock deposits in the State of California. Pages 448 to 452, inclusive, contain a description of the asphalt deposits and geological structure in the McKittrick and Sunset districts in Kern County, California, reference being made in the portion of this report to statements by Mr. W. L. Watts in Bulletin No. 3 of California State Mining Bureau mentioned above. And at page 450 of the Eldridge Report just mentioned the following quotation is made from Mr. Watt's Bulletin No. 3: (1900)

> "This recent discovery of veins of asphaltum appears the more important when we remember that formations of similar geologic age to those at Asphalto can be traced along the foothills on

the western side of the San Joaquin Valley, and it is hardly likely, therefore, that such veins are confined to the vicinity of Asphalto. The heavy mantle of alluvium covering the western foothills of the San Joaquin renders prospecting in the underlying formations difficult, but the rapid erosion which takes place during the rainy season will probably, from time to time, expose other veins, which it will be well to investigate."

(c) In Bulletin No. 213 of the United States Geological Survey, House of Representatives, Document No. 437, 57th Congress, 2d Session, entitled "Contributions to Economic Geology 1902," beginning at page 306, there appears an article entitled "The Petroleum Fields of California, by C. H. Eldridge." In this article on pages 306 to 310, inclusive, appear the following statements by Mr. Eldridge:

McKITTRICK DISTRICT. (1902)

"This district lies on the edge of the desert at the eastern base of the Coast Range, about 50 miles west of Bakersfield. The railway station is McKittrick. The Coast Range in the vicinity embraces a number of parallel ridges, the highest constituting the eastern border of the Carriso Plains. From this each succeeding ridge attains a lower altitude, until the outermost line of hills is but a gentle elevation above the general valley. The developed oil field in the region of Mc-

Kittrick lies along an interior ridge, separated from the outer ridge by a valley 1½ miles wide. The length of this district is about 25 miles."

* * *

"A noteworthy feature of the line of disturbance for several miles, both northwest and southeast of McKittrick, also, are the dikes of sandstone richly impregnated with bitumen. These vary in length from a few feet to a half mile or more, and in width up to 10 or 15 feet; their depth, of course, is unknown. Gash veins of high-grade asphalt also occur."

"The productive oil wells of this district for its entire length lie within a zone less than a quarter of a mile wide, and in places less than 200 feet wide. Their depth varies from 200 to 1,500 feet, the shallower holes being in the center of the field, opposite McKittrick. The yield is from a few up to 700 barrels, the latter exceptional. In gravity the oil varies between 11° and 17°B. While the narrow, productive zone is persistent in the general directness of its trend—about N. 60°W.—it is, nevertheless, somewhat undulating, according as the axis of crumpling or faulting varies."

(d) In the year 1901, three years before this patent, the Government had the township, where these lands are situated, surveyed, and the Government surveyors were required to note in their field notes all *mines,* salt licks and salt springs, which come to

their knowledge, and also the *quality* of the lands. (U. S. R. S. 2395, Sub. 7)

In pursuance of instructions and requirements of the law, the Government surveyors carried into their field notes of township 30 south, range 23 east, the following:

> "The surface of the ground in township 30 south, range 23 east, from the southeast corner running northwesterly, shows a geological formation, with asphaltum exudations that is regarded by experts as an almost sure indication of the presence of valuable petroleum deposits." (R. 685, 686)

These field notes of township 30-23 showing asphalt exudations were carried into the public records at Washington and have remained a part of the public records to the present time. During all of those years, the whole public was authorized to locate mining claims on these lands, enter them and develop them for their mineral deposits, including oil, and yet the American public had so little confidence of the existence of oil, in paying quantities, during those years that no oil well was put down in that township and no mineral entry was made.

(e) In accordance with its practices to secure reports as to the mineral development and discoveries through its own agents, the Government secured a report from special agent, Jay Cummings, under date of July 13, 1900, as to oil development and discoveries in numerous townships adjacent to but not

including 30-23, but including township 30 south, range 22 east, and township 31 south, range 22 east. (R. 3868) In this report, which was extremely optimistic as to future development of oil, the Cummings' report states:

> "Immediately after entering upon this investigation, I was confronted with indisputable facts that warrant me in stating that the lands in question, and very much of the contiguous country, are valuable only for their mineral worth, * * * and I make the prediction that this will soon be the largest oil field in the United States, if not in the world." (R. 3868)

The Cummings' report gave to the Interior Department the most optimistic and visionary ideas of the value of this entire country for oil and on the other hand the testimony in this case shows that many millions of dollars were wasted and lost in sinking oil wells in much of the territory embraced in the Cummings' report where no oil was found and in which dry holes resulted.

(f) It seems that the Government has secured and has on file in the Interior Department other reports from special agents as to the mineral or non-mineral character of the lands in and around the Elk Hills country and in the McKittrick district, as appears from the testimony of the Government officer and geologist, Oskar Martin.

The Government was fully advised as to all the mineral discoveries affecting the lands in suit sus-

ceptible of knowledge when the patent issued as evidenced by these numerous reports, and the Railroad company did not have, or claim to have, any other.

(g) The following is the affidavit for the Railroad company as to the non-mineral character of the lands accompanying its selection:

> CHARLES W. EBERLEIN, being duly sworn deposes and says that he is the Acting Land Agent of the Southern Pacific Railroad Company, that he has caused the lands selected in said Company's List No. 89 to be carefully examined by the agents and employees of said Company as to their mineral or agricultural character, and that to the best of his knowledge and belief, none of the lands returned in said list are mineral lands. R. 3832, 3850

The Southern Pacific Railroad Company selected these lands as indemnity and in pursuance of regulations of the Interior Department, it caused a notice to be published in a *daily newspaper* of general circulation at Bakersfield, in Kern County, where the lands are situated, *for eight weeks,* stating that application had been made to select these lands and inviting protest against these selections, and a similar notice was posted in the land office. (R. 3858, 3859) In this manner the widest publicity was given to the railroad's application for these lands, and if during the preceding years, from all the public reports and investigations, concerning these lands, any per-

son had made a discovery of oil upon them, or any of them, or desired to protest against the patenting of any of them under the railroad grant, he had a right to do so, but no protest was filed.

This was a public hearing established by the Government for the purpose of again determining the mineral or non-mineral character of these lands.

(h) In December, 1903, the Commissioner of the General Land Office, knowing that oil in paying quantities had not been found in this township during the preceding years, although asphalt seepages were indicated in that vicinity upon the public records, ordered a re-examination to be made of this land, it having been temporarily reserved from agricultural entry, as stated by the Commissioner of the General Land Office.

Mr. E. C. Ryan, special agent of the General Land Office, was directed to examine this land as to its mineral character, and to report whether the suspension from entry, placed upon the land, should not be revoked. (R. 1549-1551)

Special Agent Ryan's report follows:

DEPARTMENT OF THE INTERIOR 88085
General Land Office

Los Angeles, Cal.
January 22, 1904.

Hon. Commissioner,
General Land Office,
Washington, D. C.

Sir:

By your letter ("N" E.C.F.) of October 23, 1903, in case of *exparte* Southern Pacific Railroad Company, Quasi Contests 1997 and 1998, I was directed to proceed to and examine the SE¼ Section 23; the SW¼ Section 25; the SW¼ Section 27, Township 32 S., Range 25 E., M.D.M., and the SW¼ Section 1, Township 30 S., Range 23 E., M.D.M., said tracts having been applied for by the railroad company and to submit report stating whether or not in my opinion same should be relieved from the suspension placed thereon by telegrams "P" of February 21st and 28th, 1900.

By your letter ("N" E.C.F.) of December 10, 1903, I was directed to also examine Section 15; NE¼ and S½ Section 17; NE¼ and S½ Section 19; Sections 21, 23, 25, 27, 29, 33 and 35; Township 30 S., Range 23 E., M.D.M., and to submit report as to whether or not in my opinion said lands should be relieved from suspension.

I have the honor to report that on January 10th, 11th, 12th, 13th and 14th, 1904, I made a careful examination of the lands in question and found no oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend, in my opinion, to warrant said lands being classed as mineral in character, and

I respectfully recommend that they be relieved from suspension.

Very respectfully,
E. C. RYAN,
Special Agent, G. L. O.

This report covers all the land in the present suit.

Agent Ryan made his report on July 22, 1904, five months prior to this patent, stating that he had found no sufficient oil indications "in my opinion to warrant said lands being classed as mineral in character."

Thereupon the Commissioner of the General Land Office, by his letter of February 11, 1904, revoked his order of suspension and approved the report of Agent Ryan, (R. 1555, 1556), by letter as follows:

N. DEPARTMENT OF THE INTERIOR
General Land Office, W.O.C.
Washington, D. C. H.G.P.
February 11, 1904.

Address only
The Commissioner of the
General Land Office
Register and Receiver,
Visalia, California.

Sirs:

By telegram "P" of February 21 and 28, 1900, Townships 30 S., Range 23 E., and 32 S., 25 E., M.D.M., were suspended from disposition under

the agricultural land laws upon allegations that same contained deposits of mineral (oil).

I am now in receipt of a report from a Special Agent of this office who has examined the SW¼ Sec. 1, Sec. 15, NE¼ and S½ Sec. 17, NE¼ and S½ Sec. 19; Sections 21, 23, 25, 27, 33, 35, Tp. 30 S., R. 23 E., SE¼ Sec. 23, SW¼ Sec. 25 and the SW¼ Sec. 27, Tp. 32 S., R. 25 E., M.D.M., and who states that a careful examination thereof failed to disclose any oil seepages, oil springs, surface or other indications of oil or minerals of any kind that would tend to warrant the lands being classed as mineral. He recommends that same be relieved from suspension. The statements made in the Special Agent's report are not controverted by the records of this office and it would appear that during the period of nearly four years which has elapsed since said suspension, any persons interested in the mineral development of the lands have had ample opportunity to explore and develop the same.

In view of these facts, it appearing that no oil or mineral of any kind has been discovered upon the lands in question, it is believed that no good reason exists for the further suspension thereof. Accordingly, the lands hereinabove described are hereby relieved from suspension.

Make the proper notations upon your records.

Very respectfully,

J. H. FIMPLE,

IL Assistant Commissioner.

By telegram of February 20, 1904, the Commissioner of the General Land Office further ordered that Section 29 in Township 30 south, range 23 east, also examined by Ryan and theretofore suspended from entry under the agricultural laws, should be restored to entry. (R. 1557, 1558)

In the report of Special Agent E. C. Ryan to the Commissioner of the General Land Office under date of March 22, 1904, Special Agent Ryan reported as to the non-mineral character of all the lands in Township 30 south, Range 23 east, M.D.M., and stated:

> "Township 30 south, Range 23 east. No wells have been bored for oil, and in my opinion all the lands in this township should be relieved from further suspension." (R. 1564)

Eberlein, railroad land agent, called by the Government, testified as to the making of Ryan's report:

> "I never saw him (Ryan), never had any conversation with him. * * * He was sent into the field and did make an examination and reported. My request was that the Government make such an examination as to determine which of the lands we had selected were mineral and that as to the rest we should be allowed to select." (R. 1161) * * *
>
> "Q. * * * Was the action of the particular inspector who went upon the ground in any way influenced or controlled by you?

"A. Not at all. * * * I don't think anyone did.

"Q. * * * Was his action directed so far as you know, or ever heard of, by anyone in connection with the railroad?

"A. No sir, not that I ever heard of." (R. 1162)

Ryan made a fair and unbiased report to the Government and his conclusion in 1904 is supported by practically all the testimony in this case.

Instead of the Government not being informed as to the character of these lands, and instead of the facts being fraudulently concealed by the defendant, Southern Pacific, as alleged in the bill, the exact reverse is the truth. The application and statement, upon information and belief, made by the railroad that these lands were not mineral, within the meaning of the Act of Congress making the land grant, was borne out and sustained by the fact that no one wanted to enter or exploit these lands for oil during any part of the period when they remained open for mineral entry, and is sustained by the reports to the Government as to the lands not being known to be valuable for their mineral contents.

In issuing the patent, in question, to the Southern Pacific Railroad Company in 1904, the officers of the Interior Department had before them an abundance of evidence during a period of years, concerning their character, and had duly considered evidence on

both sides, as to the mineral or non-mineral character of this land.

The statement of opinion by the railroad company in making selection of the land is exactly according to the fact as ascertained and found by the Government and by the public that such was the known condition of these lands in 1904.

The long series of investigations by the Government, down to the issuance of this patent in 1904, completely and convincingly shows that the Government was not only fully informed in regard to the mineral indications and discoveries appertaining to the lands in suit, but also shows, beyond question, that the Government was acting at all times, upon its own information and upon reports from its own officers and agents after investigations upon the ground, and at no time did the Government in any way depend upon, or act upon, any affidavit of the railroad company, as to its knowledge and belief as to the mineral or non-mineral character of the land.

The allegations of the bill that the Government had no knowledge of the mineral or non-mineral character of the land, and had no means of ascertaining the facts, and that it was deceived by the fraudulent affidavits of the railroad, are one and all absolutely false, as disclosed by the testimony in this case taken by both sides.

(4) THERE WAS NO CONSPIRACY BY THE RAILROAD TO SECURE MINERAL LANDS UNDER AGRICULTURAL PATENT.

The agents of the railroad had no knowledge that

the lands were in fact mineral lands; the lands have been proven not to be mineral lands, the railroad agents did not even believe that the lands were mineral lands, the Government was not imposed upon by any false statement of fact and the Government possessed all the knowledge concerning these lands that any person possessed.

A mass of testimony, comprising many hundreds of pages, was taken in the District Court, much of which has been abstracted and is contained in the present record on appeal, which the Government contends proves or tends to prove that prior to the issuance of the patent in question in 1904, there was a conspiracy between the officers and agents of the Southern Pacific Railroad Company to secure patents to oil lands under the non-mineral land grant of the railroad.

It should be a sufficient answer to this claim of the plaintiff, and to the testimony upon this subject in the record, that it has not been shown that any one of the tracts of land contained in this patent was *known to contain* valuable deposits of mineral oil, prior to 1904 when the patent issued, and that it has not been shown that any such tract of land *did in fact contain* valuable deposits of mineral at that time, or since, and that it has not been shown that any of the defendants or that any of the officers or agents of the Southern Pacific Railroad Company knew that the lands, or any of them, contained valuable deposits of oil, or of other mineral prior to the date of said

patent. The bulk of the testimony consists in surmises, guesses and opinions by one person or by another, as to whether the land did or did not contain mineral oil. The whole of the testimony is speculative and matter of opinion.

Considerable of the testimony relates to correspondence by Mr. Eberlein, formerly land agent of the Southern Pacific Railroad, as to what he surmised or guessed, as to whether any of these lands contained or did not contain mineral, but as before stated, it has not been shown that Eberlein, or anyone else connected with the railroad or with the Government, knew that any of these lands contained valuable deposits of oil.

Some of this evidence relates to statements said to have been made by one Josiah Owen, who had died before this trial took place, and who was formerly a geologist employed by the Southern Pacific Railroad, but it was not shown that Owen knew or even believed that these lands were mineral. The lists of maps of the lands, which Owen guessed were mineral lands, does not contain any of the lands in suit. (R. 1615-1632)

In the court below, counsel for the Government pressed upon the court and much relied upon the testimony of Thomas J. Griffin, as showing or tending to show a conspiracy on the part of the officers and agents of the Southern Pacific, to acquire oil lands under non-mineral patents, and as showing or tending to show that certain officers or agents of the

Southern Pacific Railroad knew or believed that the lands in suit contained oil. This evidence of Griffin, so much pressed by the plaintiff, is wholly hearsay and consists of pretended conversations, which Griffin had with various prominent officials and with agents of the Southern Pacific. Griffin was an oil operator and driller in 1903 and 1904, employed by the Rio Bravo Oil Company in Texas.

Griffin claims that he was personally introduced by a Mr. Treadwell, an oil superintendent of the Southern Pacific, to Mr. E. H. Harriman, president of the Southern Pacific and Union Pacific lines, while Mr. Harriman was on a flying visit through the west.

Griffin next pretends that he had conversations in 1903 with Mr. Treadwell and that Mr. Treadwell stated that he had found oil sand and indications of oil from Sunset to Coalinga, including the Elk Hills. Treadwell flatly contradicts this statement of Griffin.

Griffin testified that he had a conversation with Mr. Dumble in the spring of 1904, in which he claims that Dumble stated, pointing to the west from a Southern Pacific Railroad train near Bakersfield:

> "Griffin, right over yonder about thirty miles is the biggest oil field in the world. I know it, so does all the rest of us know it. * * * We have large holdings over there * * * and expect to have more." (R. 1331)

Dumble testified that he was never with Griffin on any such trip and never had any such conversation,

and the undisputed testimony in this case shows that Dumble never saw the lands in the Elk Hills or the lands in Township 30, Range 23.

Dumble testified as follows:

> "I never made such a statement to anyone. I was never in the Elk Hills or on the lands in 30-23, that is in controversy in this suit up to the time that the patents were issued. There had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson." (R. 2971)

The uncontradicted evidence of Dumble shows that his opinions as to lands were based solely on reports made to him by Mr. Owen, another geologist, who had never reported to him that the Elk Hills district contained any oil land. (R. 2971) Dumble never saw the lands and never had any report from anyone that they were mineral. (R. 2988) The reports and statement of Mr. Owen, a geologist formerly employed by the Southern Pacific Railroad, were thus attempted to be brought into the case, and Mr. Owen having departed hence before this trial occurred, could not be produced as a witness.

The Government proved by Samuel P. Wible that Owen said shortly before this patent was issued that he, Owen, believed the Elk Hills *might* contain oil, but that it was probably so deep it couldn't be reached and made to pay. (R. 328)

The testimony of Griffin was thoroughly impeached by the defendants. Griffin claimed he was employed

by the Rio Bravo Oil Company in Texas during the period in question, but the evidence consisting largely of expense accounts and other papers signed by himself shows that he was not and could not have been in California where he testified he was at the time of his conversation with Mr. Dumble. (R. 2742, 2743, 2968, 2969, 3495, 3534, 3535)

George W. Armstrong, president of the Texas Rolling Mill Company and of the Fort Worth Gas Company and of the Dennison Mill & Grain Company, testified:

> "I am acquainted with the general reputation of Thomas J. Griffin for truth and veracity. * * * A number of oil men came to me to discuss the matter with me, knowing that Griffin had left the country, and the circumstances under which he left, and they seemed surprised that I did not know the character of the man; all of them seemed to know that he was both a thief and a liar." (R. 3495)

The Government claims that the following officers and agents of the railroad conspired to secure this patent to lands, which they knew to be mineral under the guise of a railroad grant.

(1) Eberlein, land agent of the Southern Pacific. But Eberlein never saw the lands in his life, had no actual knowledge whatever concerning them, (R. 1088) never received a report from anyone that they were oil lands, and did not believe they were oil lands.

(2) Owen, geologist for the Southern Pacific.

But the testimony shows that Owen's report as to the lands which were oil lands, and also which he considered probable oil lands, did not contain any of these lands in suit, and that Dumble informed Government witnesses that the Elk Hills lands might contain oil, but that if so the oil would be too deep to be profitable.

(3) Dumble, geologist for the Southern Pacific. But the undisputed evidence shows that Dumble never saw the lands, never reported them to be oil lands and never even suggested that they were oil lands.

Owen was dead when this suit was tried, but Dumble testified:

> "I was never in the Elk Hills or on the lands in 30-23 that is in controversy in this suit, up to the time that patents were issued. There had never been a report made to me either by Mr. Treadwell, Mr. Owen or Mr. Anderson. (R. 2971) * * * I did not have a remote suspicion at that time that those lands were believed to be mineral. (R. 2988) * * * Mr. Owen's examination of them was a very brief reconnaissance, but our idea from the beginning was that they were not oil territory." (R. 3014)

Here is a flat and undisputed statement that neither Owen, nor Dumble, nor Treadwell even thought or believed that these lands were oil lands, and neither Dumble, nor Eberlein ever saw them.

POINTS OF LAW AND AUTHORITIES CITED FIRST

WHEN THE UNITED STATES GOES INTO ITS OWN COURTS FOR EQUITABLE RELIEF, IT HAS THE SAME RIGHTS AND REMEDIES, AND IS GOVERNED BY THE SAME PRINCIPLES THAT ARE APPLICABLE TO INDIVIDUALS, EXCEPT ALONE THAT LACHES IS NOT ATTRIBUTABLE TO THE GOVERNMENT.

It is not to be presumed that the Government, in the present case, is seeking to cancel its patent to these lands on account of the fact that oil in California has enormously increased in value since 1904, nor can we presume that the discovery of appliances for using oil as fuel upon vessels of the navy, and the supposed need of the Government for a large supply of oil, induced the bringing of this suit.

On the contrary it must be presumed that the Government is acting in the utmost good faith, and is guided by the federal constitution, and is proceeding in accordance with Art. 5 of the Amendments to the Constitution, which provides:

> "nor shall any person * * * be deprived * * * of property without due process of law, nor shall private property be taken for public use without just compensation."

The Government is not proceeding arbitrarily and exercising a despotic force in seeking to take this property, but on the contrary, when the Government has thus filed its bill in equity in its own courts ask-

ing equitable relief, it thereby has declared that it is proceeding under the constitution, and that its rights, as well as the rights of the defendants, are to be determined by *the law of the land,* which in this case means the settled principles of equity as administered in the courts of the United States in suits between individuals.

In United States v. Bell Telephone Co., 128 U. S. 315, 366, the court, quoting from United States v. San Jacinto Tin Co., 125 U. S. 273, said:

> "But we are of opinion that since the right of the government of the United States to institute such a suit depends upon the same general principles which would authorize a private citizen to apply to a court of justice for relief against an instrument obtained from him by fraud or deceit, or any of those other practices which are admitted to justify a court in granting relief, the government must show that, like the private individual, it has such an interest in the relief sought as entitles it to move in the matter. If it be a question of property, a case must be made in which the court can afford a remedy in regard to that property; if it be a question of fraud, which would render the instrument void, the fraud must operate to the prejudice of the United States."

In Maxwell Land-Grant Case, 121 U. S. 325, at page 381, the court, speaking by Mr. Justice Miller, said:

"We take the general doctrine to be, that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emenating from the government of the United States under its official seal."

In United States v. Iron Silver Mining Co., 128 U. S. 673, at page 676, the court said:

"The government has the same right to demand a cancellation of the conveyances of the United States when obtained by false and fraudulent representations as a private individual when a conveyance of his lands is obtained in like manner. In this respect the United States, as a landed proprietor, stands upon the same footing with the private citizen. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the

alienation of public lands, can only be overcome by clear and convincing proof."

In Colorado Coal Co. v. United States, 123 U. S. 307, 317, the court said, referring to the patent which the Government was seeking to vacate:

"It thus appears that the title of the defendants rests upon the strongest presumptions of fact which, although they may be rebutted, nevertheless can be overthrown only by full proofs to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing the conclusion to which they are directed rests upon the government. Neither is it relieved of this obligation by the negative nature of the proposition it is bound to establish."

In Lalone v. United States, 164 U. S. 255, 257, the court said:

"In all proceedings instituted to recover moneys or to set aside and annul deeds or contracts or other written instruments on the ground of alleged fraud practised by a defendant upon a plaintaff, the rule is of long standing and is of universal application, that the evidence tending to prove the fraud and upon which to found a verdict or decree must be clear and satisfactory. It may be circumstantial but it must be persuasive. A mere preponderance of evidence which at the same time is vague or ambiguous is not sufficient to warrant a finding of fraud, and will not sustain a judgment based on

such finding. The rule obtains in cases of alleged fraudulent representations made to an officer of the government upon the faith of which the officer has issued a patent or done any other official act upon which the rights of the party making the misrepresentations may be founded."

In United States v. Stinson, 197, U. S. 200, 204, a suit to vacate land patents for fraud, the court, speaking by Mr. Justice Brewer, said:

"While the government, like an individual, may maintain any appropriate action to set aside its grants and recover property of which it has been defrauded, and while laches or limitation do not of themselves constitute a distinct defense as against it, yet certain propositions in respect to such an action have been fully established. First, the respect due to the patent; the presumption that all the preceding steps required by law have been observed before its issue; the immense importance and necessity of the stability of titles depending upon these official instruments demand that suits to set aside or annul them should be sustained only when the allegations on which this is attempted are clearly stated and fully sustained by proof." Citing numerous authorities.

In United States v. Clark (C.C.A. 9th C.) 138 Fed. 294, 299, Ross, Circuit Judge, says:

"As a matter of course, when the government

comes as a suitor into a court of equity, its claims appeal to the chancellor with no greater force than do those of an individual under like circumstances, etc."

SECOND

THE BASIS OF THIS SUIT FOR CANCELLATION.

The fundamental basis of a suit for cancellation of a written instrument, on the ground of fraudulent representations in its procurement, was stated by the court in Southern Development Co. v. Silva, 125 U. S. 247, 250, as follows:

"In order to establish a charge of this character the complainant must show by clear and decisive proof—

"First. That the defendant has made a representation in regard to a material fact;

"Secondly. That such representation is false;

"Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

"Fourthly. That it was made with intent that it should be acted on;

"Fifthly. That it was acted on by complainant to his damage; and,

"Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true."

Slaughter's Admr. v. Gerson, 13 Wall. 379;

Farrar v. Churchill, 135 U. S. 609, 616;

Farnsworth v. Duffner, 142 U. S. 43, 47;
Shappirio v. Goldberg, 192 U. S. 232, 241:

THIRD

AS TO THE CHARACTER OF THE LAND THE GOVERNMENT HAD BEFORE IT AMPLE TESTIMONY ON BOTH SIDES OF THE CASE AND FAIRLY DECIDED THE FACTS, AND THE PATENT IS CONCLUSIVE, AS TO THE NONMINERAL CHARACTER.

McGoldrick v. Kinsolving, 221 Fed. 826, 827;

Chandler v. Calumet Mining Company, 149 U. S. 79, 89, 92;

McCormick v. Hayes, 159 U. S. 332, 338;

Rogers, etc., Company v. American Emigrant Co., 164 U. S. 559, 574, 575;

Michigan Land Company v. Rust, 168 U. S. 589, 592:

The distinction is made in:

United States v. Minor, 114 U. S. 233, 239, and

Washington Sec. Co. v. United States, 234 U. S. 76, 78; that where the proceedings are purely *exparte,* where no issue was framed, where no hearing was had that the findings by the patent are not conclusive.

In the present case numerous investigations were had; numerous reports as to the mineral or nonmineral character were made and finally a public hearing was had after two months' notice to invite and hear protests from adverse claimants.

FOURTH

MINERAL LANDS ARE CONFINED TO THOSE LANDS KNOWN TO BE VALUABLE FOR THEIR MINERAL CONTENTS AT OR BEFORE THE TIME THEY ARE ENTERED OR PATENTED.

The congressional grant to the Southern Pacific Railroad Company, as well as other railroad grants, excludes "mineral lands," except coal and iron. The lands were to be identified by patents.

As to what definition should be given to the term "mineral lands" in this and other grants we must turn to the legislation of congress concerning the reservation and disposal of "mineral lands."

U. S. Revised Stats. section 2318, provides as follows:

> "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law."
>
> "Section 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2320 contains the following provision:

"but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Section 2329 provides:

"Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

The settled principles established by numerous decisions interpreting the mineral land laws are as follows:

In order to issue a valid patent to land as mineral, it must have been established that the land contained valuable mineral deposits.

When it is sought to vacate a patent to land, issued as nonmineral, the fact as to the nonmineral chacacter of the land is adjudicated and determined by the issuance of the patent itself which is conclusive on collateral attack, and can only be vacated on direct attack in a suit brought up by the Government upon full, clear and convincing evidence, that the land was known to contain valuable mineral deposits prior to the issuance of the patent.

Barden v. Northern Pac. Railroad, 154 U. S. 288;

Chrisman v. Miller, 197 U. S. 313, 321;

Colorado Coal Co. v. United States, 123 U. S. 307, 317;

United States v. Iron Silver Mining Co., 128 U. S. 673;

Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 441;

Davis v. Weibbold, 139 U. S. 507;

Shaw v. Kellogg, 170 U. S. 312, 338;

Deffeback v. Hawke, 115 U. S. 392;

Burke v. Southern Pac. Railroad Co., 234 U. S. 669, 709;

Diamond Coal Co. v. United States, 233 U. S. 236, 239;

Washington Sec. Co. v. United States, 234 U. S. 76, 78;

McCaskill Company v. United States, 216 U. S. 504, 509;

Wright-Blodgett Co. v. United States, 236 U. S. 397;

FIFTH

WHAT CONSTITUTES DISCOVERY OF MINERAL AND MINERAL LANDS.

The act of congress of June 25, 1910, (36 Stat. 848) empowered the president to withdraw and reserve public lands. Under that act many millions of acres were withdrawn, but, prior to the withdrawals, numerous persons had gone upon the land to explore for mineral, especially for oil and the Department of Justice contended that none of these locations were valid as against the withdrawals unless actual discoveries of oil, in paying quantities, had been made

Carrying out this policy the Attorney General instituted numerous suits against these locators and in several instances receivers have been appointed to take charge of the oil and operate the properties pending the results of litigations.

The theory of the Government was and is in those cases, that a discovery of oil cannot be based nor sustained alone by geological indications, nor by expert opinions, nor by theories, as to seepages, outcroppings, anticlines, synclines and monoclines, but that oil can be discovered only under the mining laws by development work upon the property.

In this situation congress passed the act of June 25, 1910, and in section 2 of that act it is provided as follows:

> "Sec. 2. That all lands withdrawn under the provisions of this act shall at all times be open to exploration, discovery, occupation, and purchase, under the mining laws of the United States, so far as the same apply to minerals other than coal, oil, gas, and phosphates: Provided, That the rights of any person, who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands, and who, at such date, is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order, so long as such occupant or claimant shall continue in diligent prosecution of said work: And provided further, That

this act shall not be construed as a recognition, abridgement, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such land made prior to the passage of this act."

Congress, by this act, declared that locations of all of these claims should be made valid by the act only in case the locators proceeded *"in diligent prosecution of work leading to discovery of oil or gas."*

The action of the courts in appointing receivers for these properties and the action of the Department of Justice in prosecuting these numerous cases, and the legislation of congress in this act of 1910, result in a consensus of opinion and interpretation of the law that *geological theory* cannot be substituted for *actual discovery* of oil and this concurrent construction, by different departments of the Government, harmonizes with the universal experience of oil operators as shown by the testimony in this case.

In the recent case of United States v. McCutchen, No. 12 Equity, U. S. District Court, Southern District of California, Judge Bledsoe on July 12, 1915, appointed a receiver for the tract of land involved in that suit, which was claimed by the Government on the one hand as having been reserved by the United States under authority of the act of 1910, and was claimed by the defendant as oil land located as a placer mining claim.

Judge Bledsoe ordered a receiver for this property upon the ground that the defendant locator had not

proceeded diligently, after his location, to *prosecute work leading to the discovery of oil.* That land was in the midst of the lands involved in the various suits of the Government to vacate patents to the Southern Pacific Railroad, and had the same geological indications of oil in 1904 as it had in 1910. Defendant McCutchen had as much evidence of the presence of oil, and the benefit of six years more of development in that vicinity than the railroad had when patents were issued for this land, in 1904, and yet it was assumed by the court, that no such discovery could have been made by McCutchen as would warrant a mineral location. (See also U. S. v. McCutchen, 238 Fed. 575).

In other words the Government "blows hot and blows cold." In one class of cases the Government can discover now from geological indications that lands years ago were known to contain valuable deposits of oil, but claims by a locator with all the evidence that the Government had, with years more of development, is not a sufficient discovery of oil to warrant a location.

To escape this ridiculous position, counsel for the Government ingenuously seek to distinguish between lands known to be mineral and lands upon which a discovery sufficient for location, may be made, but all the rulings have been that it requires more testimony and a stronger showing to prove that lands are *known to be valuable for mineral* than to show that the lands contain sufficient mineral to warrant a location.

The whole argument goes back to sections 2318,

2319 and 2320 U. S. Rev. Stats. In section 2318 it is declared that lands *valuable for mineral* are reserved from sale, and section 2319 declares that *all valuable mineral deposits in lands* are subject to location and purchase, while section 2320 declares that no location of a mining claim shall be made until a *discovery of mineral* on the land. There is no other definition in the laws of the United States as to what constitutes mineral lands subject to location. It is in all cases those lands *valuable for the minerals* which they contain, which are mentioned, and they cannot be located as mining ground until a discovery sufficient to warrant development has been made.

Every decision declaring what discovery of mineral is sufficient to warrant a location is an authority upon the question as to what are valuable mineral lands within the meaning of these statutes. No lands are proven to be *known* for their valuable mineral contents where sufficient mineral has not been discovered, to authorize their location. A thing cannot be known which has not been discovered.

In Chrisman v. Miller, 197 U. S. 313, the court again pointed out what was necessary in order to make a discovery sufficient to warrant location, and also what was meant by lands known to be valuable for mineral, and the court said at pages 321, 323:

> "What is necessary to constitute a discovery of mineral is not prescribed by statute, but there have been frequent judicial declarations in respect thereto. In United States v. Iron Silver

Mining Company, 128 U. S. 673, a suit brought by the United States to set aside placer patents on the charge that the patented tracts were not placer mining ground but land containing mineral veins or lodes of great value, as was well known to the patentee on his application for the patents, we said (p. 683):"

"It appears very clearly from the evidence that no lodes or veins were discovered by the excavations of Sawyer in his prospecting work, and that his lode locations were made upon an erroneous opinion, and not upon knowledge, that lodes bearing metal were disclosed by them. It is not enough that there may have been some indications by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as 'known' veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. Although pits and shafts had been sunk in various places, and what are termed in mining cross-cuts had been run, only loose gold and small nuggets had been found, mingled with earth, sand and gravel. Lodes and veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed when the application for the patents were made."

"It is true that when the controversy is between two mineral claimants the rule respecting the sufficiency of a discovery of mineral is more liberal than when it is between a mineral claimant and one seeking to make an agricultural entry, for the reason that where land is sought to be taken out of the category of agricultural lands the evidence of its mineral character should be reasonably clear, while in respect to mineral lands, in a controversy between claimants, the question is simply which is entitled to priority. That, it is true, is the case before us. But even in such a case, as shown by the authorities we have cited, there must be such a discovery of mineral as gives reasonable evidence of the fact either that there is a vein or lode carrying the precious mineral, or if it be claimed as placer ground that it is valuable for such mining."

In United States v. Lavenson, 206 Fed. 755, the Government succeeded in vacating a patent issued to a mining claim, located as a lode for gold, and while other questions than discovery were involved in the case, the court said at page 762:

"Discovery is necessary to initiate a mining right. To constitute discovery, it is necessary that mineral-bearing rock in place be found, under such circumstances and of such a character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing it, with the reason-

able expectation of finding ore in paying quantities. This implies, not only that the conditions warrant a reasonably prudent man in so proceeding, with such reasonable expectation, but that the applicant for patent has that expectation. The claim may be valuable for other purposes and the applicant may, in part, be actuated by knowledge of its nonmineral value."

"It may be, as contended, that Stevens was moved in his advice to Sawyer as much by the existence of the valuable growth of timber on the land as by the existence of gold in the ground, and that the timber could be advantageously used by the Iron Silver Mining Company. If such were the fact, it would not affect the applicant's claim to a patent. Probably in a majority of cases, where a placer claim is located, other matters than the existence of valuable deposits of mineral enter into the estimate of its worth. Its accessibility to places where supplies and medical attendance can be obtained for the men engaged in working upon it, and timber secured to support the drifting or tunneling which may be necessary, the facility with which water can be brought to wash the mineral from the earth, sand, or gravel with which it may be mingled, and the uses to which the land may be subjected when the claim is exhausted, may be proper subjects of consideration. A prudent miner, acting wisely in taking up a claim, whether for a placer

mine or for a lode or vein, would not overlook such circumstances, and they may in fact control his action in making the location. If the land contains gold or other valuable deposits in loose earth, sand, or gravel, which can be secured with profit, that fact will satisfy the demand of the government as to the character of the land as placer ground, whatever the incidental advantages it may offer to the applicant for patent."

In the important case of Multnomah Mining, Milling & D. Co. v. United States, 211 Fed. 100, the Circuit Court of Appeals for the Ninth Circuit decreed the cancellation of certain patents issued for lode claims in Washington state. In that case the mines had been actually worked for gold and gold had been actually extracted, but the court held that the *quantity* and *value* was not sufficient to show a *profitable* mine, and the court, speaking by Judge Gilbert, said at page 101:

"The witnesses for the appellant were the officers and employes of that company. They testified to having found small quantities of flake and "flour" gold, and in one instance a small piece of gold which they call a "nugget," but which in some mining districts would be called coarse gold, but the extremely scant quantities found, and the testimony adduced, only tend to confirm the conclusions reached by the witnesses for the government. There is doubtless in the land in

controversy a small quantity of fine gold, such as may be found in all the lands along the Columbia river from its headwaters to the ocean. But the proof is convincing that no gold in paying quantities has been discovered on these claims. If the land included in these placer claims was mineral land, or contained mineral sufficient to justify mining, that fact was capable of demonstration. The suit to set aside the patents was brought in March, 1908. The testimony of the appellant was taken in July, 1909. In the interval between those dates, there was ample time for the development and ascertainment of the mineral value of the land. For one month in that interval, the appellant did operate a sluice box, at which three men worked, but the the quantity of gold produced was so inconsiderable as to indicate the futility of further operation. We have carefully considered the contention of the appellant that while the ground may not be operated at a profit by panning or sluicing, it might be successfully mined by the hydraulic process. But the suggestion is a mere conjecture, based upon no tangible or scientific evidence, and it does not avail to sustain the validity of mining claims which were so evidently initiated without the discovery which the law requires."

The contention in the present case is that the patents are voidable for the alleged reasons, that each

tract was *known mineral land, prior to patent,* and known to contain valuable deposits of petroleum.

Before this land could be located as oil land, it would be necessary to prove that the land not only contained petroleum but that the land was *chiefly valuable* on account of its petroleum deposits. The act of congress of February 11, 1898, 29 Stat. 526, authorized the location, under the placer mining laws, of lands containing petroleum or other mineral oils and *chiefly valuable therefor.*

So that when the agents of the railroad company, not having pretended to have sunk any wells upon the property, nor representing that any other person had drilled any oil well, nor made any actual discovery of oil, stated in its information and belief this land was non-mineral, this was a mere statement of opinion and could not have been, in its very essence, a statement of fact, either that the land did not contain valuable deposits of petroleum or mineral oil, nor that the land was not *chiefly valuable* for its petroleum or mineral oil.

In Diamond Coal Co. v. United States, 233 U. S. 236, the court cancelled certain patents issued to Thomas Sneddon and another for a body of land entered and patented as soldiers' additional homestead, and conveyed to the coal company, upon the ground that it was proven to the court that these lands were known to be valuable for coal at the time patents were issued. It was established by the evidence found by the court, (pages 241, 242, 243) that;

"The lands were in a valley, three or four miles in width, bounded on the east and west by foothills. * * * Along the western base of the eastern hills was the outcrop of another coal bed. This outcrop had been weathered down and in some places covered by the wash from above, but it could be traced upon the surface for several miles. It had been opened up at different places, and the openings disclosed a coal bed, from six to fourteen feet in thickness, dipping to the west at an angle of from fifteen to twenty-five degrees from the horizontal. * * * This coal was of superior quality and recognized commercial value, and the rocks containing it were the coal-bearing strata of that region. * * Attracted by this outcrop, the coal company opened a mine thereon, in the vicinity of these lands, in 1894. * * * Sneddon was in charge of the attempt. He was acquainted with the lands and all their surroundings and was well informed upon the subject of coal mining."

The court further stated at pp. 247, 248 that the evidence showed:

"With the requisite certainty that at the time of the proceedings in the land office the lands were known to be valuable for coal. * * * They were all adjacent to the outcrop and above the place of the coal-bearing strata dipping under the valley. In alternate even-numbered sections they substantially paralleled the outcrop

for seven miles, and in two places were separated from it by only a few rods. Those to the north were opposite the company's developed mine No. 4, and those to the south were opposite the tract acquired through Lees, upon which good coal was disclosed. The outcrop, the disclosures in the vicinity, and the geological formation pointed with convincing force to a workable bed of merchantable coal extending under the valley and penetrating these lands."

The Supreme Court recognized that there was a distinction between valuable coal beds lying flat or horizontal and other mineral deposits, which lie in veins or in lodes or kidneys, and the court used the following guarded language:

"It will be perceived that we are not here concerned with a mere outcropping of coal with nothing pointing persuasively to its quality, extent or value; neither are we considering other minerals whose mode of deposition and situation in the earth are so irregular or otherwise unlike coal as to require that they be dealt with along other lines."

The law of the case was stated by the court in part as follows:

"If at that time the land was not thus known to be valuable for mineral, subsequent discoveries will not affect the patent. The inquiry must be directed to the situation at that time, as were the applicant's proofs and the finding of the land

officers. If the proofs were not false then, they cannot be condemned, nor the good faith of the applicant impugned, by reason of any subsequent change in the conditions. We say 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable. * * * We also say lands known at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered."

In Burke v. Southern Pacific Railroad Co. 234 U. S. 669, at page 700, the court by Mr. Justice Van Devanter, quoting with approval from Barden v. Northern Pacific Railroad Co., 19 L. D. 188, said:

"It would seem from this uniform construction of that Department of the Government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining States, Federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of Congress should

be considered to apply only to such lands as were at the time of the grant (patent) known to be so valuable for their minerals as to justify expenditure for their extraction. The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated."

And the court further said at page 705:

"These decisions are applicable and controlling here. The reasoning upon which they proceed compels their reaffirmance, and besides, they have come to be recognized as establishing a rule of property."

In United States v. Plowman, 216 U. S. 372, 374, the court speaking by Mr. Justice Holmes, said concerning the right of miners to cut timber on mineral lands:

"The matter was much discussed in Davis v. Weibbold, 139 U. S. 507, and there it was said that the exceptions of mineral land from preemption and settlement, etc., 'are not held to exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be so at the date of the grant."

In United States v. Kostelak, 207 Fed. 447 at pages 452, 453, Judge Bourquin of Montana said:

"Outcroppings of mineral upon certain land

are more or less evidentiary but by no means conclusive of its mineral character, and off the land their value as evidence rapidly lessens. The mountains of the West and the adjacent valleys and plains are ribbed with mineral vein outcroppings. They indicate possibilities or probabilities of valuable mineral deposits, but they are only indications. The country is pockmarked with prospect holes upon them. Some resolve these possibilities into realities and disclose valuable minerals, but far more fail therein, so that it is a common and truthful saying, born of costly and sad experience, that but one prospect in a thousand warrants development and unearths mineral deposits of value. Lands of great agricultural value and devoted solely to agricultural uses often contain these croppings of no value. The distance any vein may continue is notoriously uncertain, and presumptions are to be cautiously indulged. This is illustrated by Dahl v. Raunheim, 132 U. S. 263, 10 Sup. Ct. 74, 33 L. Ed. 324, wherein it is held that a vein of quartz exposed 200 or 300 feet without the boundaries of a placer claim and trending in the direction of said claim, as would appear from the record in said case, is not presumed to extend within it." * * *

"To the argument that, unless these beliefs, speculations, presumptions are indulged, the government by nonmineral or agricultural entry

may be unlawfully deprived of lands that time and development may prove to contain valuable mineral deposits may be responded that conditions at the time of entry and sale govern; that, if the lands are placed on the market, and at entry and sale are not known to contain such deposits, a nonmineral or agricultural entry is the only lawful entry that can be made thereon; it is not unlawful deprivation but lawful sale; and, if time and development should discover mineral deposits of the greatest value therein, that is the good fortune of the entryman at which the government nor any can cavil. Furthermore, if the government desires to retain to itself the possibilities of mineral deposits of value, Congress can legislate to that end that lands containing any indications of minerals shall be classed as and entered and sold as mineral lands, or that as provided by Acts June 22, 1910, c. 318, 36 Stat. 583 (U. S. Comp. St. Supp. 1911, p. 614), the surface may be entered under nonmineral laws, the coal, if any, being reserved, or the land department can withdraw such lands from nonmineral or agricultural entry, even as it did the land here involved, and, if it is believed the geological conditions are such that valuable deposits may exist therein, can maintain the withdrawal until time and development determine."

In Barnard Realty Co. v. Nolan, 215 Fed. 996, the court said at page 999:

"Float, outcroppings, lodes, and abandoned locations, separately or combined, are not sufficient to constitute a 'known lode' within the exclusion of the placer mining law. To be impressed with such character the lode must, at the time of application for the placer patent, be clearly ascertained and defined, and of such extent and content that it will then, in view of conditions then, justify development and exploitation, and because of which the placer claim is valuable and more valuable than for placer mining purposes. Subsequent development, however marvelous the results, is immaterial if the lode be not thus 'known' when the application for the placer patent is made. And the reason is lode outcrops exist everywhere in the mining country. Not one in hundreds develops into a profitable mine. Valueless, no reason exists to exclude them from public grants and patents, and such grants made and patents issued without excluding them prima facie lodes of value do not exist. See Iron Silver Case, 143 U. S. 405, and cases cited; Migeon v. Ry. Co., 77 Fed. 256, 23 C. C. A. 156."

In Clark Montana Realty Co. v. Ferguson, 218 Fed. 959, at page 964, the court said:

* * * The issue is determined now by conditions as they were when the placer patent was applied for, even as though tried and determined then. Subsequent development and

results, however marvelous, are immaterial. For if they are received in evidence and given evidentiary value, judgment is not based upon conditions as they were when the placer patent was applied for, but upon subsequent events, not consequences—the most fallible and dangerous of all criteria. The sanctity of a solemn grant of lands by the United States and the definiteness and certainty that should attach thereto and the stability of titles evidenced thereby, can only thus be preserved. See Iron Silver Case, 143, U. S. 405; Migeon v. Railway Co., 77 Fed. 256, 23 C. C. A. 156; Thomas v. Mining Co., 211 Fed. 106, 128 C. C. A. 33; Mason v. Mining Co., 214 Fed. 34, 130 C. C. A. 426."

"To revert to the evidence herein, all of subsequent development, disclosures, results, and conditions not consequent, is inadmissible and not considered. It will not do to contend that what is upon the premises now is some evidence of what was upon them then, for that is not the issue; it being what was known to be upon the premises then."

In the recent and important case of United States v. McCutchen, 238 Fed. 575, in which the Government seeks recovery of oil lands upon the ground that no valuable mineral discovery had been made upon them by the locators, Judge Bledsoe says:

"The well-known litigation between Miller and Chrisman ultimately found its way into the

Supreme Court of the United States. 197 U. S. 313. That tribunal, in affirming the judgment of the courts of California, had occasion to express itself with reference to what constitutes a sufficient discovery under the act of 1897. If I mistake not, it is the only case in which the highest tribunal in the land has announced its conclusion with respect to this particular matter. Preliminarily, it should be observed that the 'discovery' therein relied upon was in fact a discovery of mineral, to-wit, petroleum. That only a small amount, such as would run from a spring, float over the water, and drip down over a 'rock about two feet high,' was the quantity discovered, is true; but the fact to which I desire to draw particular attention is that oil itself was actually discovered. This, I think, serves to give added point also to the conclusions of the Supreme Court. After adverting to the language of the act of 1897, providing that lands 'chiefly valuable' for oil could be located, the court says of the above-mentioned Barrieau discovery:"

'It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration.'

"And this is must be remembered is with respect to a discovery involving the finding of petroleum itself."

* * * * * * *

"The court then, adverting to the liberality of the rule as between adverse claimants to mineral land, with respect to what will constitute a 'discovery,' and after conceding that that was the case then before the court, proceeds to hold that:"

'Even in such a case * * * there must be such a discovery of mineral as gives reasonable evidence of the fact * * * if it be claimed as placer ground, that it is valuable for such mining.'

"Adopting the conclusion thus announced, there is nothing in the case at bar tending to show that the quantity of gas actually encountered had at the time of its discovery, or at any period up to the time of this trial, any appreciable commercial value, or that its presence in the land, in the quantity in which it was found, served to impress upon the land any value at all. In the absence of such showing, in the face of this decision, I do not see how defendants' contentions can be accepted."

"In Cook v. Johnson, 3 Alaska, 506, 534, et seq., the district court, in considering the sufficiency of a discovery under the placer law, calls attention to this holding of the Supreme Court in Miller v. Chrisman, and indulges in the observation, which is very persuasive with me, that the court used the language employed there as indicative of an intention to lay down a somewhat dif-

ferent rule with respect to the sufficiency of a discovery under the petroleum act, as differentiated from one under the general mining law."

As showing that the right to locate public land as mineral, must be preceded by discovery of a *valuable mineral deposit,* Judge Bledsoe quotes with approval from the following cases:

Castle v. Womble, 19 L. D. 455, 457;

Cook v. Johnson, 3 Alaska, 506, 534;

Butte Oil Company Case, 40 L. D. 602;

Olive Land Etc. Co. v. Olmstead, 103 Fed. 568: Opinion by Judge Ross.

Southwestern Oil Co. v. A. & P. R. Co. 39 L. D. 35;

Bay v. Oklahoma etc. Gas Co. 13 Okl. 425, 73 Pac. 936;

New England Oil Co. v. Congdon, 152 Cal. 211;

McLemore v. Express Oil Co., 158 Cal. 559;

Miller v. Chrisman, 140 Cal. 440;

SIXTH

LANDS IN SUIT WERE NOT EXCEPTED FROM SOUTHERN PACIFIC GRANT.

The grant to the Southern Pacific of July 27, 1866, (14 Stat. 292) was of * * * "alternate sections of public land not mineral, designated by odd numbers." * * *

The mineral lands of the United States as we have seen from the legislation of congress and decisions

of courts, are all those lands containing "*valuable* mineral deposits."

Section 2319 U. S. R. S. provides as follows:

"All *valuable* mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase." * * *

Section 2320 declares:

"No location of a mining claim shall be made *until the discovery* of the vein or lode within the limits of the claim located."

Section 2325 declares:

"A patent for any land claimed and located for *valuable* deposits may be obtained in the following manner * * * (Italics ours)"

Section 2329 provides:

"Claims usually called placers, including all forms of deposits excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims."

In Northern Pacific Railway v. Soderberg, 188 U. S. 526, 536, the court said:

"That mineral lands include not merely metalliferous lands, but all such as are chiefly *valuable* for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture."

The only public lands in odd sections within the

limits of the Southern Pacific grant, which were taken out of and excepted from that grant, were the "mineral lands," meaning thereby such lands as were open to location and entry under the mining laws of the United States. All other lands passed under the grant to the Southern Pacific, and as to indemnity when selected and patented, the patent would convey a perfect title.

No public lands under the terms of this act, could have been excepted from this grant unless they contained "VALUABLE DEPOSITS," and no such lands could be located and acquired from the United States unless a "DISCOVERY of VALUABLE DEPOSITS" had been made.

It is established beyond question in this case that none of these lands in suit were actually known to contain "valuable deposits of mineral" sufficient to have warranted a mineral location prior to the patent in 1904.

The lands in suit at that time not having been subject to location under any of the mineral laws, they could not have been excepted from the grant as mineral.

SEVENTH

THE RAILROAD DID NOT MAKE ANY MISREPRESENTATION AS TO ANY MATTER OF FACT. ITS NONMINERAL AFFIDAVIT ON INFORMATION AND BELIEF WAS A MERE STATEMENT OF OPINION AND NOT ACTIONABLE.

The fundamental basis of a suit for cancellation

of a contract, on the ground of fraudulent representations, stated in Southern Development Company v. Silva, 125 U. S. 247, 250, and in other cases above cited, was:

"In order to establish a charge of this character the complainant must show by clear and decisive proof:—

"First. That the defendant has made a representation in regard to a material fact." Citing:

Attwood v. Small, 6 Cl. and Finn, 232 (House of Lords);

Jennings v. Broughton, 5 DeGex, Macnaghten and Gordon, 126;

Tuck v. Downing, 76 Ill. 71, 94;

And the court quoted from the latter case, the following extract with approval.

"No man, however scientific he may be, could certainly state how a mine, with the most flattering outcrop or blowout, will finally turn out. It is to be fully tested, and worked by men of skill and judgment. Mines are not purchased and sold on a warranty, but on the prospect. 'The sight' determines the purchase. If very flattering, a party is willing to pay largely for the chance. There is no other sensible or known mode of selling this kind of property. It is, in the nature of the thing, utterly speculative, and everyone knows the business is of a most fluctuating and hazardous character. How many

mines have not sustained the hopes created by their outcrop!" (125 U. S. 252)

In Bell v. Morley, 223 Fed. 628, 630, C. C. A. Ninth Circuit, the court affirmed a decree of the court below, adjudging that representations based upon estimates as to the quantity of timber on a tract of land were not actionable and were only matters of opinion, and the court said:

"In the present case the parties had before them, pending the negotiations for the sale, certain estimates showing the quantity of timber on the land according to a cruise made some years before. This cruise was not made by the agent who represented the appellees in the negotiations for the sale of the property; he had no personal knowledge as to the quantity of timber on the land, and did not claim to have. Any statement made by him was therefore a mere matter of opinion, based on information furnished by third persons, known by the appellants to be such, and, so far as the record discloses, that opinion was expressed in the utmost good faith."

"To furnish grounds for an action of deceit the representation must be of a matter susceptible of approximately accurate knowledge, and must be in form or substance an assertion importing knowledge on the part of the speaker. A statement which by reason of its form or subject-matter amounts merely to an expression of opin-

ion is not actionable, for it is one upon which reliance cannot safely be placed. 20 Cyc. 17."

The bill of complaint alleges, in the present case as the ground of cancellation, that the patentee made false and fraudulent representations of fact as to the nonmineral character of the land; that the patentee knew the statements were false and alleges that the plaintiff had no knowledge of the actual facts, and that the plaintiff relied upon the representations and affidavit of the patentee and was induced, by such false and fraudulent representations, to issue the patent in question. The evidence shows that all of these allegations are untrue, that the actual facts, as to the land being mineral or nonmineral, so far as ascertained by anyone, were open and notorious, and known to the plaintiff and to all others, and that no facts were known to the patentee which established or proved the mineral character of the land. All of the testimony agrees that the opinion that oil existed in valuable quantity, quality and at a workable depth, was a matter of speculation, prognostication or divination proven only by the drill.

The "nonmineral' affidavit was only made on information and belief. R. 3832, 3850

In Synnott v. Shaughnessy, 130 U. S. 572, which was a suit for cancellation, the bill of complaint alleged, in substance; that the defendant misrepresented to the plaintiff, the facts in regard to a large body of ore, which it was alleged the defendants had

knowledge of and concealed from the plaintiff, and the court said at pages 579, 580:

> "The only indications of any such ore body or vein that had been found were simply a few small pieces of ore known as 'float' ore, which did not of necessity indicate the existence of any large ore body. Further, the fact that Porter had found 'float' ore on the claim was made known to the plaintiffs before they made the deed for the claim. Such purely surface indications, open to all ordinary observers, and situated on or near the path along which the plaintiffs travelled in going to and from their work, must have been known to them, and are not such as to be made the subject of concealment and misrepresentation. The fact, however, that there was no such discovery of an actual vein or body of ore demonstrates that there could have been no such fraudulent and collusive concealment and misrepresentation, as to its limit and extent, as is charged in this complaint. It required not only a considerable excavation, but also a great outlay of money and great labor on the part of the defendant to develop the existence of a vein of ore."

In the case of Gordon v. Butler, 105 U. S. 553, 557, the court held, that misrepresentations as to value and mineral contents of land, not actually explored by excavation, was not actionable but were mere ex-

pressions of opinion upon which the plaintiff had no right to rely, and the court said:

"The case of Holbrook v. Connor, which arose in the Supreme Court of Maine, illustrates this doctrine. There the vendor and his agent represented, among other things, that lands sold by them contained large deposits of oil, and were of great value for the purpose of digging, boring for, and manufacturing it; and upon the representations the purchasers acted. The evidence tended to show that the representations were false and fraudulent, and the plaintiff obtained a verdict; but the Supreme Court set it aside. It appeared that the land had not been tested; and it was unknown to both parties whether it was valuable as oil land, except so far as might be inferred from the production of wells of neighboring lands, and a single well upon the land in question. The court held that under these circumstances the representation was to be regarded as a matter of opinion, and would not support the action." (60 Me. 578).

"Whenever property of any kind depends for its value upon contingencies which may never occur, or developments which may never be made, opinion as to its value must necessarily be more or less of a speculative character; and no action will lie for its expression, however fallacious it may prove, or whatever the injury a reliance upon it may produce. The determination

of its truth or falsity, until the contingency occurs or becomes impossible, would lead the court into investigations for which they have no fixed rules to guide their own judgments or to instruct juries."

This doctrine is sustained in:

Kimber v. Young, 137 Fed. 744, 749 C. C. A.;

Mooney v. Miller, 102 Mass. 217;

Cooper v. Lovering, 106 Mass. 77;

Holbrook v. Connor, 60 Me. 578:

In Rendell v. Scott, 70 Cal. 514, the court said:

"It was certainly matter of opinion when the plaintiff stated that the land * * * was very rich and productive * * * that a portion of it was good alfalfa land *and that another portion was rich in mineral deposits.*" (Italics ours)

Lee v. McClelland, 120 Cal. 147;

Bickel v. Munger, 129 Pac. 958: (Cal. Ap.)

In Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 435, 436, the court again distinguished between known mines and theories, beliefs and speculative testimony, and the court said:

"Defendants offered a mass of testimony, the scope of which was similar to that condemned as insufficient in the case of Iron Silver Mining Co., v. Reynolds, supra, (124 U. S. 374). Its purport was that it was commonly believed that underlying all the country in that vicinity was a nearly horizontal vein or deposit, frequently called a

blanket vein; and that the parties who were instrumental in securing this placer patent shared in that belief, and obtained the patent with a view to thereafter developing such underlying vein. But whatever beliefs may have been entertained generally, or by the placer patentees alone, there was up to the time the patent was obtained no knowledge in respect thereto. It was, so far as disclosed by this testimony, on the part of everybody, patentees included, merely a matter of speculation and belief, based not on any discoveries in the placer tract, or any tracings of a vein or lode adjacent thereto, but on the fact that quite a number of shafts sunk elsewhere in the district had disclosed horizontal deposits of a particular kind of ore, which it was argued might be merely parts of a single vein of continuous extension through all that territory. Such a belief is not the knowledge required by the section. In the case referred to this court said: 'There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge, and thus in effect incorporate new terms into the statute.'

EIGHTH

PRIOR TO THE ISSUANCE OF THE PATENT AND AFTER SELECTION BY THE RAILROAD THE UNITED STATES, BY ITS

OWN AGENTS, INVESTIGATED THE LAND AS TO ITS CHARACTER AND CANNOT BE HEARD TO SAY THAT IT WAS IMPOSED UPON BY FALSE REPRESENTATIONS.

The Ryan reports, copied above (R. 1549, 1559), set forth that by direction of the Commissioner of the General Land Office, Ryan personally investigated and twice reported as to the character of the lands covered by this patent, and found that they were not known to be valuable oil lands. There was also a hearing in the Land Office after eight weeks' notice to the public (R. 3860). In the face of these investigations the Government cannot be heard to say that it was imposed upon by any false representation.

In Slaughter's Admr. v. Gerson, 13 Wall, 379 at page 383 the court stated the rule as follows:

> "Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining

party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained."

In Southern Development Company v. Silva, 125 U. S. 247 at page 259, the court said:

"It is essential that the defendant's representations should have been acted on by complainant, to his injury. Where the purchaser undertakes to make investigations of his own, and the vendor does nothing to prevent his investigation from being as full as he chooses to make it, the purchaser cannot afterwards allege that the vendor made misrepresentations."

In the United States v. San Jacinto Tin Co., 125 U. S. 273, 299, the court refused to vacate or even to cast a doubt upon a patent issued by the United States where its annulment was sought on the ground of fraud in its procurement, where it appeared as it did in that case that the facts had been investigated by the Government prior to the issuance of the patent, and the court said:

"We consider this examination of the case in the office of the Commissioner and its re-examination by the Secretary of the Interior as possessing the very strongest probative force in regard to the question of fraud, which was mooted before them, as well as the question of the proper location of the grant. No stronger evidence could be given of the honesty of Commissioner

> Wilson and his belief in the correctness of the survey than the fact of his reference of the whole matter to the Secretary of his own motion without any appeal by either party from his decision. They had in the Land Office abundant materials for the investigation of all the matters in dispute; they had before them the interested parties, with all the evidence which they could collect, the records, the Mexican archives and control of all the papers of the government since the territory came into the possession of the United States, as well as ample time, more than this court has, to consider all these subjects. Very little that is new or that throws any light upon the questions at issue is now produced on the hearing of this case."

The present case is much like the San Jacinto Tin case in the following important respects:

In both cases there was an examination of the questions of fact by the Commissioner of the Land Office, and reports by him upon the subject.

In both cases the Interior Department had before it all of the material facts, which could have been adduced upon the hearings. The fact is, in the present case, there is no material fact before the court that was not before the Interior Department, and contained in reports to or publications of the Government.

In Farnsworth v. Duffner, 142 U. S. 43, at page 48, the court said:

"In the case of Attwood v. Small, decided by the House of Lords, and reported in 6 Cl. and Finn. 232, 233, it is held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations.' And in 2 Pomeroy's Equity Jurisprudence, section 892, it is declared that a party is not justified in relying upon representations made to him. '1. When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement. 2. When, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence. 3. When the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.'

"But if the negelect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori is he precluded when it appears that he did make such examination, and relied on the evidences furnished by such examination, and not upon the representations."

In Shappirio v. Goldberg, 192 U. S. 232 at pages 241, 242, the court said:

> "When the means of knowledge are open and at hand or furnished to the purchaser or his agent and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he has been deceived to his injury by the misrepresentations of the vendor."

In Pomeroy's Eq. Juris., volume 2, section 893, the author lays down the following general principle applicable to this question:

> "If, after a representation of fact, however positive, the party to whom it was made institutes an inquiry for himself, has recourse to the proper means of obtaining information, and actually learns the real facts, he cannot claim to have relied upon the misrepresentation and to have been misled by it. Such claim would simply be untrue. The same result must plainly follow when, after the representation, the party receiving it has given to him a sufficient opportunity of examining into the real facts, when his attention is directed to the sources of information, *and he commences, or purports or professes to commence, an investigation* (italics ours). The plainest motives of expediency and of justice require that he should be charged with all the knowledge which he might have obtained had he pursued the

inquiry to the end with diligence and completeness. He cannot claim that he did not learn the truth, and that he was misled."

Citing among numerous other cases:

Farrar v. Churchill, 135 U. S. 609;

The Government was not in anyway prevented, deterred or obstructed in investigating the character of the land in suit.

The Government did in fact investigate its character through numerous agents, and had numerous reports through a long series of years prior to issuing the patent.

The Government caused the land to be surveyed and all mineral land to be noted and had received the field notes of the survey of this Township (30-23) where it was reported in the field notes that there were veins of asphalt in this township indicating mineral. (R. 685, 686)

The Government also caused the land to be examined and reported upon in the year 1900 by special agent Cummings, who reported in effect, that a large vicinity of country thereabouts was probably oil land. (R. 3868, 3877)

In January, 1904, the same year this patent was issued, and prior to its issuance, *but after it was selected,* the Government caused these particular lands to be examined and reported upon by special agent E. C. Ryan, who reported the land as nonmineral. (R. 1550, 1551)

On March 22, 1904, the land was again reported

upon by special agent Ryan as nonmineral. (R. 1560, 1567)

The Government then directed a public examination by causing a notice to be published for eight weeks in a daily newspaper to the effect that lands were applied for as nonmineral and inviting contest, and posting a similar notice in the local land office for a like period. (R. 3860, 3858)

The Government therefore not only had the means of ascertaining the character of the lands and did cause an examination to be made to ascertain their character, but more than that, caused a series of examinations to be made and investigated the character of the lands to the fullest extent. The Government is therefore not permitted under the principles of equity, to say that it was deceived by any statement regarding their character in the issuance of the patent.

NINTH

THE ACTS OF THE RAILROAD WERE IN HARMONY WITH THE RULES, DECISIONS AND PRACTICES OF THE COURTS AND INTERIOR DEPARTMENT WHEN THE SELECTION WAS MADE.

An inspection of the opinion shows that the learned judge of the District Court was somewhat confused in his conclusions, as to the alleged fraud of the railroad company by the habitual use by Government counsel of the expression for "lands known to be

valuable for their mineral contents'' such words as ''lands generally known to be mineral.''

Government counsel has sought to prove by hearsay, by loose neighborhood talk, by surmises, by suspicions and by geological prognostication that the lands in suit were in the language of Government counsel ''generally known to be mineral,'' and in the application of this expression, has substituted theory and beliefs for the actual facts.

The facts established in this case by Government testimony, that there were no oil seepages or oil wells upon any of these lands at any time, and the undisputed facts established that no oil wells had been drilled on these lands, or within four miles of them, prior to 1905, conclusively shows that there was no false representation, concealment or statement made by the railroad company in selecting these lands as lands not known to be valuable for their mineral contents when the selections were made.

The settled rules of decision of the Interior Department for years preceding the application to select in 1904, that department having control of the public lands and primarily charged with the construction of the acts of congress and their application, ought to be a guide to the court in this case as to what is meant by the term ''mineral lands.''

In Frees v. Colorado, 22 L. D. 510, it was decided that openings on a tract of land disclosing surface coal, without proof of value and extent, were not

sufficient to prove the mineral character of the land as coal land.

In Commissioners of Kings County v. Alexander, 5 L. D. 126, 127, Secretary Lamar said:

> "But it has been repeatedly held by this department that the proof of the mineral character of land must be specified and based upon the actual production of mineral; that it is not enough to show that neighboring or adjoining lands are mineral in character, and that the lands in controversy may hereafter develop minerals to such an extent as to show its mineral character, but it must be shown as a present fact that the lands are mineral, and this must appear from actual production of mineral and not from a theory that the lands may hereafter produce it." Citing numerous decisions.

This rule of interpretation was followed in:

Savage v. Boynton, 12 L. D. 612, 614;

Southwestern Oil Company v. Atlantic & Pacific R. R. Co., 39 L. D. 335;

East Tintic Consolidated Mining Claim, 40 L. D. 271;

Butte Oil Company, 40 L. D. 602;

Notwithstanding the conclusions of the learned judge, we submit that it is inconceivable for this court to so interpret the laws and rules of decision of the courts, and of the land department, prior to December 12, 1904, as to say that the Railroad Company was guilty of a fraud in representing that, in its opin-

ion, these lands were not mineral lands, when this statement, even if one of fact and not mere opinion, was in harmony with those decisions, rules and practices at the time the application to select was made.

TENTH

CONCLUSION

In conclusion it is submitted.

First. That the defendant railroad has not made any representation in regard to a material fact and has only purported, in its selections and affidavit, to state its opinions and beliefs as to the lands not being known to contain valuable minerals, based upon a superficial examination of the lands without any wells having been drilled or explorations made in the interior of the earth.

Second. That it has not been shown that any representation, made by defendant railroad, is false, for that no oil well has been sunk or other excavation made upon any of the numerous tracts involved in this suit, either prior to the date of the patent or at any time since, and no oil well, either before or since the date of the patent, has been sunk on any lands in the vicinity of the lands in suit, which has been shown to produce oil in commercially paying quantities.

Third. That the representations made by defendant railroad were not acted upon by the Government, or by the officers of the Interior Department, but on the contrary, the uncontradicted evidence shows that

from 1866 down to the date of the patent in 1904 the Government had caused numerous reports to be made concerning these lands, as to their mineral or non-mineral character, and *after* the railroad selected the land, the Government caused the land to be personally examined by its special agent, Ryan, who reported that the land was non-mineral, and instead of the representations, by the railroad on its information and belief, being relied upon, the Government repudiated such representations and not only secured but relied upon its own reports.

Fourth. That it has not been shown that the complainant was ignorant of any falsity in plaintiff's representations based upon information and belief, but on the contrary, the record conclusively established that the Government was better informed as to the mineral or nonmineral character of this land than the railroad or any other person.

The decree of the District Court should be reversed with direction to dismiss the bill of complaint.

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Appellants "Points and Authorities" herein are accompanied by "Appellants' Brief Upon the Facts."